88-309

No. 88-

Supreme Court, U.S.
FILED
AUG 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

VOLUME I
(Pages 1a-366a)

JOSEPH B. MEYER
Attorney General
S. JANE CATON
Assistant Attorney General
State of Wyoming
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

MICHAEL DOUGLAS WHITE *
DAVID F. JANKOWSKI
Special Assistants
Attorney General
State of Wyoming
WHITE & JANKOWSKI
511 16th Street, Suite 500
Denver, Colorado 80202
(303) 595-9441
Counsel for Petitioner

* Counsel of Record

August 19, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

370

TABLE OF CONTENTS

APPENDIX A — Page

Wyoming Supreme Court Original Opinion (February 24, 1988) 1a

APPENDIX B

Wyoming Supreme Court Order Denying Petition for Rehearing (April 22, 1988) 120a

APPENDIX C

District Court Order, Denying Treaty Priority Date Modifying and Correcting Findings of Fact and Conclusions of Law, Ruling on Certain Specified Claims, and Deferring Acceptance of Recommended Final Decree in the Special Master's Supplemental and Final Report (Johnson) (May 24, 1985) 121a

APPENDIX C-1

Wyoming Supreme Court Order on Appeal Procedures (October 30, 1985) 163a

APPENDIX D

District Court Amended Judgment and Decree (Johnson) (May 24, 1985) 168a

APPENDIX E

District Court Order Ruling on Motions to Alter or Amend the Decision of May 10, 1983 (Johnson) (June 8, 1984) 185a

APPENDIX F

District Court Decision (Joffe) (May 10, 1983) 202a

APPENDIX G

Master's Supplemental and Final Report (June 1, 1984) 280a

APPENDIX H

Master's Report (December 15, 1982) 367a

TABLE OF CONTENTS—Continued

APPENDIX I — Page

U.S. District Court Order Granting Motion to Remand and Remanding to State Court (Kerr) (May 31, 1977) 718a

APPENDIX J

Discount Rate, 44 Fed. Reg. 210 (1979) 725a

APPENDIX K

Wyo. Stat. § 1-37-106 (1977) 726a

APPENDIX L

Tenth Permanent Restoration Order, 39 Fed. Reg. 27561 (1974) 729a

APPENDIX M

Water Resources Planning Act, 42 U.S.C. § 1962d-17(a) (1974) 730a

APPENDIX N

Ninth Permanent Restoration Order, Act of Aug. 15, 1953, Pub. L. No. 284, 67 Stat. 592 ..... 731a

APPENDIX O

Eighth Permanent Restoration Order, 13 Fed. Reg. 8818 (1948) 735a

APPENDIX P

Seventh Permanent Restoration Order, 10 Fed. Reg. 7542 (1945) 737a

APPENDIX Q

Sixth Permanent Restoration Order, 10 Fed. Reg. 2254 (1945) 739a

TABLE OF CONTENTS—Continued

	Page
APPENDIX R	
Fifth Permanent Restoration Order, 9 Fed. Reg. 9749 (1944); Order Amending Order of Restoration 159, 10 Fed. Reg. 2812 (1945)	741a
APPENDIX S	
Fourth Permanent Restoration Order, 8 Fed. Reg. 6857 (1943)	744a
APPENDIX T	
Third Permanent Restoration Order, 7 Fed. Reg. 11100 (1942)	746a
APPENDIX U	
Second Permanent Restoration Order, 7 Fed. Reg. 7458; Correction to Regulation 186, 7 Fed. Reg. 9439 (1942)	748a
APPENDIX V	
First Permanent Restoration Order, 5 Fed. Reg. 1805 (1940)	751a
APPENDIX W	
Act of June 18, 1934, Ch. 576, 48 Stat. 984 (1934); [current version at 25 U.S.C. §§ 461, 462 (1982)]	753a
APPENDIX X	
Act of March 3, 1905, 33 Stat. 1016 (1905)	769a
APPENDIX Y	
Wyoming Admission Act, 26 Stat. 222 (1890)	782a
APPENDIX Z	
Wyo. Const. Art. VIII, §§ 1, 3 (1890)	792a
APPENDIX AA	
Second Treaty of Fort Bridger, 15 Stat. 673 (1868)	793a
APPENDIX BB	
Act of July 27, 1939, 53 Stat. 1128 (1939)	804a

APPENDIX A

IN THE SUPREME COURT, STATE OF WYOMING

OCTOBER TERM, A.D. 1987

February 24, 1988

No. 85-203

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING.

THE STATE OF WYOMING,

Appellant,

v.

OWL CREEK IRRIGATION DISTRICT MEMBERS; SHOSHONE AND ARAPAHOE TRIBES; LANDIS WEBBER and BARBARA WEBBER, individually and on behalf of Red Creek Cattle Company, BERTHA JONES and GRACE GRABOSKI; UNITED STATES; CITY OF RIVERTON, MIDVALE IRRIGATION DISTRICT, and RIVERTON VALLEY IRRIGATION DISTRICT,

Appellees.

No. 85-204

OWL CREEK IRRIGATION DISTRICT MEMBERS,

Appellants,

v.

THE STATE OF WYOMING, SHOSHONE AND ARAPAHOE TRIBES; LANDIS WEBBER and BARBARA WEBBER, individually and on behalf of Red Creek Cattle Company,

BERTHA JONES and GRACE GRABOSKI; UNITED STATES; CITY OF RIVERTON, MIDVALE IRRIGATION DISTRICT, and RIVERTON VALLEY IRRIGATION DISTRICT,

Appellees.

No. 85-205

SHOSHONE AND ARAPAHOE TRIBES,

Appellants,

v.

THE STATE OF WYOMING, OWL CREEK IRRIGATION DISTRICT MEMBERS, LANDIS WEBBER and BARBARA WEBBER, individually and on behalf of Red Creek Cattle Company, BERTHA JONES and GRACE GRABOSKI; UNITED STATES; CITY OF RIVERTON, MIDVALE IRRIGATION DISTRICT, and RIVERTON VALLEY IRRIGATION DISTRICT,

Appellees.

No. 85-217

LANDIS WEBBER and BARBARA WEBBER, individually and on behalf of Red Creek Cattle Company, BERTHA JONES and GRACE GRABOSKI,

Appellants,

v.

THE STATE OF WYOMING; OWL CREEK IRRIGATION DISTRICT MEMBERS; SHOSHONE and ARAPAHOE TRIBES; UNITED STATES; CITY OF RIVERTON, MIDVALE IRRIGATION DISTRICT, and RIVERTON VALLEY IRRIGATION DISTRICT,

Appellees.

No. 85-218

CITY OF RIVERTON, MIDVALE IRRIGATION DISTRICT, and RIVERTON VALLEY IRRIGATION DISTRICT,

Appellants,

v.

THE STATE OF WYOMING; OWL CREEK IRRIGATION DISTRICT MEMBERS; SHOSHONE and ARAPAHOE TRIBES; LANDIS WEBBER and BARBARA WEBBER, individually and on behalf of Red Creek Cattle Company, BERTHA JONES and GRACE GRABOSKI; UNITED STATES,

Appellees.

No. 85-225

UNITED STATES,

Appellant,

v.

THE STATE OF WYOMING, OWL CREEK IRRIGATION DISTRICT MEMBERS; SHOSHONE and ARAPAHOE TRIBES; LANDIS WEBBER and BARBARA WEBBER, individually and on behalf of Red Creek Cattle Company, BERTHA JONES and GRACE GRABOSKI; UNITED STATES; CITY OF RIVERTON, MIDVALE IRRIGATION DISTRICT, and RIVERTON VALLEY DISTRICT; ALBERT HORNECKER and HORNECKER LIVESTOCK CO., INC., DONALD BATH and DHB & CO., and PLB & CO., BRADFORD BATH, GRIFFIN BROTHERS, INCORPORATED, RALPH FLOYD URBIGKIT, CHARLES RICHARDSON and RICHARD and ELSIE MARTIN, all non-Indian parties,

Appellees.

No. 85-226

ALBERT HORNECKER and HORNECKER LIVESTOCK CO., INC., DONALD BATH and DHB & CO., and PLB & CO., BRADFORD BATH, GRIFFIN BROTHERS, INCORPORATED, RALPH FLOYD URBIGKIT, CHARLES RICHARDSON and RICHARD and ELSIE MARTIN, all non-Indian parties,

Appellants,

v.

THE STATE OF WYOMING, OWL CREEK IRRIGATION DISTRICT MEMBERS; SHOSHONE and ARAPAHOE TRIBES; UNITED STATES; LANDIS WEBBER and BARBARA WEBBER, individually and on behalf of Red Creek Cattle Company, BERTHA JONES and GRACE GRABOSKI; CITY OF RIVERTON, MIDVALE IRRIGATION DISTRICT, and RIVERTON VALLEY IRRIGATION DISTRICT,

Appellees.

No. 85-236

ROBERT W. HARVEY and OLGA J. HARVEY, MARY O. AHLBORN, OWEN BARNETT and EVA M. BARNETT, BLACK BUTTE LIVESTOCK COMPANY, CAMPBELLS, INC., PHYLLIS L. CRANDALL and KENNETH WARD CRANDALL, BILLY M. and BARBARA J. DANIELS, CARL DOCKERY and CAROL DOCKERY, CLYDE R. FISHER and GLORIA A. FISHER, CHARLES GOLDBEN, GARY V. KELLOGG and BRENDA JOYCE KELLOGG, RUSSELL E. LONG and IRENE M. LONG, WILLIAM A. MATTHEWS, ARTHUR D. MCCUMBER, MARVIN W. MEYER and ERNESTINE S. MEYER, VERN NELSON and CAROLYN R. NELSON, NORWEST BANK OF OMAHA N.A., NORRIS EDWIN ODDE and F. LOUISE ODDE, WILLIAM OKIE, KENNETH and IONA OUTLAND, SYLVIA PAULSEN, JERRY D. REDDING and SHELIA C. REDDING, RED LANE WATERSHED IMPROVEMENT DISTRICT, C. DUANE RUSH and KATHERINE C. RUSH, BRIAN F. SANFORD and KATHLEEN SANFORD, NORMAN L. SANFORD, NEWELL S. SESSIONS and DAISY E. SESSIONS, BARBARA SMITH, ROBERT STEWART, TOWN OF EAST THERMOPOLIS, VE BAR LIVESTOCK COMPANY, RAYMOND C. and DELORES J. WEESE, and RUTH CLARE YONKEE,

Appellants,

v.

THE STATE OF WYOMING, UNITED SATES; OWL CREEK IRRIGATION DISTRICT MEMBERS; SHOSHONE and ARAPA-

HOE TRIBES; LANDIS WEBBER and BARBARA WEBBER, individually and on behalf of Red Creek Cattle Company, BERTHA JONES and GRACE GRABOSKI; UNITED STATES; CITY OF RIVERTON, MIDVALE IRRIGATION DISTRICT, and RIVERTON VALLEY IRRIGATION DISTRICT; ALBERT HORNECKER and HORNECKER LIVESTOCK CO., INC., DONALD BATH and DHB & CO., and PLB & CO., BRADFORD BATH, GRIFFIN BROTHERS, INCORPORATED, RALPH FLOYD URBIGKIT, CHARLES RICHARDSON, and RICHARD and ELSIE MARTIN, all non-Indian parties,

Appellees.

Appeal from the District Court of Laramie County
The Honorable Alan B. Johnson, Judge

Joseph B. Meyer, Attorney General; S. Jane Caton, Assistant Attorney General; Steven F. Freudenthal, Special Assistant Attorney General, with Freudenthal, Freudenthal, Salzburg, Bonds & Rideout, Cheyenne; Houston G. Williams, Special Assistant Attorney General, with Williams, Porter, Day & Neville, Casper; Michael D. White and David F. Jankowski, Special Assistant Attorneys General, with White and Jankowski, Denver, Colorado; and Randall T. Cox, Special Assistant Attorney General, with Omohundro and Palmerlee, Buffalo, for State of Wyoming. Argument presented by Michael D. White, for Type 1 and 2 Claims, and Randall T. Cox for Type 1, 2 and 3 Claims; also present at counsel table were A. G. McClintock, Wyoming Attorney General, and S. Jane Caton, Assistant Attorney General.

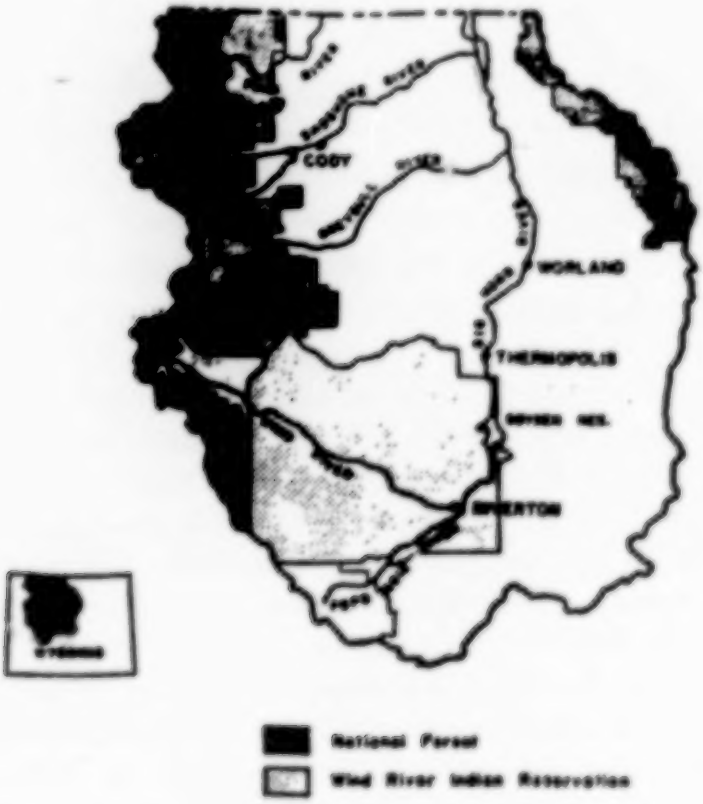
Ruth Clare Yonkee, Thermopolis, for Red Lane Watershed Improvement District, Town of East Thermopolis; C. Edward Webster, II, Cody, for Owl Creek Irrigation District; Donald P. White of White & White, Riverton, for City of Riverton, Midvale Irrigation District and

Riverton Irrigation District; Kenneth Guido, Jr., Washington, D.C. for Shoshone Tribe; W. Richard West, Jr. and Susan M. Williams of Fried, Frank, Harris, Shriver & Jacobson, Washington, D.C., and B. Kevin Gover and Susan M. Williams of Gover, Williams & Stetson, Albuquerque, New Mexico, and Thomas W. Fredericks, Dale T. White, and Robert S. Pelcyger of Fredericks & Pelcyger, Boulder, CO, and William J. Thomson and W. Perry Dray of Dray, Madison & Thomson, Cheyenne for Shoshone and Northern Arapahoe Tribes; Michael S. Messenger of Messenger & Jurovich, Thermopolis, for Landis Webber and Barbara Webber, individually and on behalf of Red Creek Cattle Company, Bertha Jones and Grace Graboski; F. Henry Habicht II, Assistant Attorney General and James J. Clear, Department of Justice, Washington, D.C. for United States, Sky D Phifer of Phifer & Phifer, Lander, for Albert Hornecker and Hornecker Livestock Co., Inc., Donald Bath and DHB & Co., and PLB & Co., Bradford Bath, Griffin Brothers, Inc., Ralph Floyd Urbigkit, Charles Richardson and Richard and Elsie Martin; Ross D. Copenhaver of Copenhaver, Kahl & Kath, Powell, for Willwood Irrigation District and Deaver Irrigation District. Oral argument presented by Robert S. Pelcyger for Arapahoe Tribes, Type 1, 2, and 3 Claims; C. Edward Webster II for Owl Creek Irrigation District, Type 2 Claims; Donald P. White for private parties City of Riverton, et al., Type 1 Claims; James J. Clear for United States, Type 1 and 2 Claims; Michael S. Messenger for private parties Type 3 Claims; Sky D. Phifer for Hornecker, et al., Type 3 Claims; also present at counsel table were Ruth Clare Yonkee; Dale T. White; Thomas W. Fredericks; David F. Jankowski; and B. Kevin Gover, Arthur Lazarus, Jr., and W. Richard West, Jr., attorneys for the Shoshone Tribes.

Before BROWN, C.J., and THOMAS, CARDINE, and MACY, JJ., and HANSCUM, D.J.

By the court: BROWN, C.J., on Parts III, VII A, B, and D; CARDINE, J., on Parts I, II, IV, V, and VI;

MACY, J., on Parts VII C, VIII and IX. THOMAS, J., filed a dissenting opinion in which HANSCUM, D.J., joined. HANSCUM, D.J., filed a separate dissenting opinion.



WATER DIVISION NO. 3

Source: Tom Sharp, Supervisor
Water Division III, General Adjudication,
State Engineer's Office

I

INTRODUCTION

This appeal is from the district court's order adjudicating rights to use water in the Big Horn River System and all other sources within the State's Water Division

No. 3. The district court modified the special master's recommended decree. All parties have appealed from the district court's amended judgment and decree. We affirm in part and reverse in part.

A. *Geography and History*

We begin by acknowledging the comprehensive reports of both the special master and the district court and our use of these reports in our preparation of this section of this opinion.

Water Division No. 3 is essentially identical with what is known as the Big Horn River drainage basin. (See map, oppositie page.) It is located in Fremont, Hot Springs, Washakie, Big Horn and Park counties in northwestern and west central Wyoming and includes parts of Yellowstone National Park. Other federal entities included are the Wind River Indian Reservation, located in the southeastern portion of the region, consisting of approximately 4,000 square miles of land area, the Shoshone and Big Horn National Forests, the East Fork Winter Elk Pasture, the Sheridan County Elk Winter Pasture, the Yellowtail Wildlife Habitat Management Area, the Middle Creek Drainage Area of Yellowstone National Park, the Big Horn Canyon National Recreation Area, and numerous public water reserves, water wells and stock driveways upon federal lands administered by the Bureau of Land Management.

The topography of the area is varied. It includes mountain peaks and valleys, high plateaus, terraced stream valleys and low desert badlands. Elevations range from 3,870 feet near the town of Basin to over 13,000 feet in the Wind River Range. On the reservation the elevation varies from 4,500 feet at the northeastern corner near the Wind River Canyon to 12,500 feet in the Wind River Range.

The primary drainage system in the division is the Wind River-Big Horn River which originates in northern Fremont County and leaves the Division at the Wyoming-Montana border in northern Big Horn County. By statutory definition the division also includes the Clark's Fork of the Yellowstone River, § 41-3-501(a)(iii), W.S. 1977, originating in northwestern Park County, which drains much of the northwestern portion of the region. The Shoshone River, a major tributary of the Big Horn River which originates in northern Park County and joins the Big Horn at the Yellowtail Reservoir, is the other major drainage system in Division 3.

The history of the Big Horn Basin for purposes of this case begins in the early 1800's when explorers, trappers and traders began traveling into northwestern Wyoming, part of the vast hunting grounds of the peripatetic Shoshone Indians. Neither group encroached on the other and relations were friendly. Nonetheless, in 1865, the United States, hoping to preserve the peace and stability, reached an agreement delineating the area within which the Eastern Shoshone roamed, a 44,672,000 acre region comprising part of Wyoming, Colorado and Utah. Following the Civil War, as the westward movement gained momentum, the United States government realized the size of the region set aside for Indians only was unrealistic, and on July 3, 1868, executed the Second Treaty of Fort Bridger with the Shoshone and Bannock Indians, establishing the Wind River Indian Reservation.

During their first years on the reservation, the Shoshone Indians were still dependent on the buffalo as the mainstay of their life, but as the supply rapidly decreased, they began to rely upon an agricultural economy. During the 1870's the Shoshone Indians increased their efforts in both farming and ranching. The Shoshone ceded lands beyond the Popo Agie back to the United States in the 1872 Brunot Agreement. The Arapahoe

moved to the reservation in 1878. By the 1880's it was evident that the agricultural economy of the Indians was failing, and by 1895, the Indians on the Wind River Indian Reservation were totally dependent on the government for food, clothing and shelter. These economic misfortunes compelled them to sell more of their land to the United States. The First McLaughlin Agreement, or Thermopolis Purchase, was concluded in 1897; the Big Horn Hot Springs was the main feature of the lands ceded to the United States for cash payment. An additional 1,480,000 acres of reservation land were ceded to the Government in the Second McLaughlin Agreement in 1904-1905. The revenue derived helped to develop the remaining reservation lands (which came to be known as the "diminished reservation"). The United States Government offered the ceded lands for sale to others, under the provisions of the homestead, townsite, coal and mineral land laws, and reimbursed the Tribes or expended for the benefit of the Tribes the money raised by the sales.

The earliest non-Indian settlements in northwestern and north central Wyoming were near the gold and silver fields in the South Pass area of the Wind River Range. These mining camps soon expanded into permanent farming and ranching communities which relied primarily on cattle ranching and dryland or easily-irrigated farming for sustenance. By the mid-1800's, many small communities had been established by settlers who had obtained their land under the Congressional land disposal acts. By the early 1900's most of the best land in the region was occupied by ranches or irrigated farms. Yet the settlers continued to arrive, forcing gradual expansion onto the dry basin floors and prompting the development of many irrigation projects, often sponsored jointly by private citizens and the United States. The arrival of the homesteaders in the Wind River Basin significantly altered the Indian's economic base. As the number of settlers

and their farms increased, the number of Indians working their own farms and ranches decreased, and they began to rent and eventually to sell their land while hiring themselves out as laborers.

In 1934, all remaining lands which had been ceded to the United States by the 1904 agreement were reserved from non-Indian settlement. In 1940, the Secretary of Interior began a series of restorations of certain undisposed lands to tribal ownership. These lands again became part of the existing Wind River Reservation. In addition, the United States later reacquired, in trust for the Tribes, additional ceded land and certain lands within the diminished reservation which previously had passed into private ownership. Since 1953, the size of the reservation has remained fairly stable.

B. *Procedural History of the Instant Litigation*

On January 22, 1977, Wyoming enacted § 1-1054.1, W.S.1957 (now § 1-37-106, W.S.1977), authorizing the State to commence system-wide adjudications of water rights. The State of Wyoming filed the complaint commencing this litigation and naming the United States as a defendant on January 24, 1977, in the District Court of the Fifth Judicial District of Wyoming.

The United States removed the case to the United States District Court for the District of Wyoming in Cheyenne, Wyom g, claiming the state court was without jurisdiction in this suit against the United States. The federal district court granted the State's motion to remand the case to state court on June 1, 1977, finding that the McCarrar Amendment and § 1-37-106, W.S. 1977, provided for jurisdiction in the state court.

On August 21, 1977, the United States moved to dismiss in state court, again alleging that the state court was without jurisdiction and that the Tribes were an indispensable party. The court granted the Tribes' mo-

tion for leave to file an amicus curiae brief on the dismissal motion. The Shoshone and Arapahoe Indian Tribes also moved to intervene, alleging that the United States would not adequately represent their interests. The court granted intervention on November 21, 1977, and the Tribes entered their appearance. On December 20, 1977, Judge Joffe denied the United States' motion to dismiss and granted the State of Wyoming partial summary judgment on the United States' jurisdictional defenses.

On April 20, 1978, the State moved the court to certify this case to the Board of Control pursuant to § 1-37-106(a)(i)(A)(I), W.S.1977. Judge Joffe entered a First Order of Certification and Referral to the Wyoming State Board of Control on August 22, 1978. The United States and the Tribes objected to the certification and moved for the appointment of a special master. After receiving suggestions, selecting a master and allowing time for objections, Judge Joffe appointed the special master on May 4, 1979. The First Order of Certification and Referral to a special master, entered on May 29, 1979, charged the special master with the duty to:

> "1. Determine the status of those rights which are evidenced by previous Court decrees, as set out in Appendix B to the Complaint herein, as well as those rights evidenced by certificates heretofore issued by the Board of Control, as set out in Appendix C to the Complaint herein, which Appendices may be revised to more accurately reflect the records of the State Engineer and State Board of Control.
>
> "2. Determine the status of all uncancelled permits to acquire the right to use of water as set out in Appendix D and Appendix E to the Complaint herein, which Appendices may be revised to more accurately reflect the records of the State Engineer and State Board of Control.
>
> "3. Adjudicate any interest in or right to use the water of the Big Horn River System and all other

sources within Water Division No. 3, State of Wyoming, arising under the permits described in paragraph 2, above.

"4. Determine the extent and priority date of the adjudicate [sic] any other interest in or right to use the water of the Big Horn River System within Water Division No. 3, State of Wyoming, not otherwise represented by the aforedescribed decrees, certificates, or permits, including, but not limited to, any appropriate or reserved rights of the Arapahoe Tribe, Shoshone Tribe, or of the United States in either its proprietary or fiduciary capacity, which may be hereafter identified by said Tribes or the United States and which are not subject to the decrees, permits and/or certificates described in paragraphs 1 and 2 above."

The United States filed its initial statement of claims on March 6, 1980, and supplemental claims on May 29, 1980. The Tribes filed an additional claim on April 4, 1980.

The case was divided into three phases: Phase I, Indian reserved water rights (appeal decided here); Phase II, non-Indian federal reserved water rights (completed); and Phase III, state water rights evidenced by a permit or certificate (pending).

The master approved stipulations allowing provisional confirmation of adjudicated rights and settling boundaries and dates. He also dismissed the off-reservation hunting and fishing claims and denied summary judgment on instream flow claims made by the Bureau of Land Management. The trial began January 26, 1981, and concluded December 1981.

The special master signed his 451-page Report Concerning Reserved Water Right Claims by and on Behalf of the Tribes in the Wind River Reservation on December 15, 1982, covering four years of conferences and hear-

ings, involving more than 100 attorneys, transcripts of more than 15,000 pages and over 2,300 exhibits.

The report recognized a reserved water right for the Wind River Indian Reservation and determined that the purpose for which the reservation had been established was a permanent homeland for the Indians. A reserved water right for irrigation, stock watering, fisheries, wildlife and aesthetics, mineral and industrial, and domestic, commercial, and municipal uses was quantified and awarded.

A final judgment adjudicating the non-Indian federal reserved water rights (Phase II), pursuant to stipulation, was entered February 9, 1983.

The State of Wyoming, the United States, the Shoshone and Arapahoe Tribes, and numerous private parties presented objections to the master's report, and on May 10, 1983, Judge Joffe entered his Findings of Fact, Conclusions of Law and Judgment approving that portion of the master's report awarding reserved water rights for practicably irrigable acreage within the Wind River Indian Reservation and refusing to accept that portion of the master's report recommending an award of reserved water rights for other than agricultural purposes.

On May 13, 1983, this case was assigned to State District Judge Alan B. Johnson. The United States, the State of Wyoming and the Tribes then moved to alter or amend Judge Joffe's decree. On May 24, 1985, pursuant to Rule 54(b), W.R.C.P., the Amended Judgment and Decree from which this appeal is taken was entered.

A 95-page Supplemental Report was filed June 1, 1984, recommending that those individuals who succeeded to the interests of an Indian allottee and individuals owning land which had once been part of the reservation but was obtained under public land acts and not directly from an allottee be awarded state permit priority dates.

As to the remaining state water rights, the master recommended future proceedings. On May 24, 1985, Judge Johnson entered an order deferring acceptance of the June 1, 1984 Supplemental and Final Report of the Master, providing:

> "Reservation reserved rights are rights created by the courts solely for the protection and enjoyment of Indian tribes so that they can make their reservations their homelands. These rights do not pass to successors in interest to Indian lands. Therefore, this Court will not award to non-Indian parties an 1868 priority date for their water rights." (Citations omitted.)

The court held that non-Indian successors were entitled to water rights with priority dates established by permits and/or certificates issued by the State of Wyoming, or by evidence of appropriation of water for beneficial use and deferred decision on these claims.

On July 5, 1985, the United States moved for reimbursement of one-half the special master's fees and expenses (Phase I costs) on grounds that the McCarran Amendment prohibits assessment of costs against the United States. The motion was denied.

II

JURISDICTION

Early in the litigation, the Tribes challenged the jurisdiction created by § 1-37-106, W.S.1977, on grounds that Article 21, § 26 of the Wyoming Constitution, the so-called disclaimer provision, barred any state court adjudications of Indian water rights. On appeal the Tribes concede that there is no federal law preventing state courts from adjudicating Indian reserved water rights but maintain that the disclaimer provision of the Wyoming Constitution barred the district court, as a matter

of state law, from asserting jurisdiction over their water rights. Because the Tribes' claim involves construction of the Wyoming Constitution, not a federal question, our decision on this issue is final. Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 561, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983).

Article 21, § 26 of the Wyoming Constitution states:

> "The people inhabiting this state do agree and declare that they *forever disclaim all right and title* to the unappropriated public lands lying within the boundaries thereof, and *to all lands lying within said limits owned or held by any Indian or Indian tribes*, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States *and that said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States* • • •." (Emphasis added.)

This disclaimer is almost identical to those found in the constitutions and enabling acts under which Congress admitted most western states into the Union. See Enabling Act of Feb. 22, 1889, § 4, 25 Stat. 676, 677 (North Dakota, South Dakota, Montana, and Washington); Enabling Act of July 16, 1894, § 3, 28 Stat. 107, 108 (Utah); Enabling Act of June 16, 1906, § 3, 34 Stat. 267, 270 (Oklahoma); Enabling Act of June 20, 1910, § 2, § 20, 36 Stat. 557, 558-559, 569 (New Mexico and Arizona); Enabling Act of July 7, 1958, § 4, 72 Stat. 339, as amended by Act of June 25, 1959, § 2(a), 73 Stat. 141 (Alaska). See also Ariz. Const., Art. 20, ¶ 4; Idaho Const., Art. 21, § 19; Mont. Const., Ordinance No. 1; N.M. Const., Art. 21, § 2; Utah Const., Art. 3. The disclaimers and enabling acts did not establish new bars to state jurisdiction over Indians. They were simply intended to make clear that the new states entered the Union subject to the same jurisdiction limitations first imposed upon the other states by the landmark case of

Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832). See Arizona v. San Carlos Apache Tribes, supra 463 U.S. at 561-563; Comment, State Disclaimers of Jurisdiction Over Indians: A Bar to the McCarran Amendment, 18 Land & Water L. Rev. 175, 180 (1983) (discussing Draper v. United States, 164 U.S. 240, 17 S.Ct. 107, 41 L. Ed. 2d 419 (1986)).

The argument that the state disclaimer should be interpreted to be more protective of the Tribes than the controlling federal law, the McCarran Amendment, has been presented to the Tenth Circuit Court of Appeals and the Supreme Courts of Arizona and New Mexico. Each of these courts has rejected the argument. Jicarilla Apache Tribe v. United States, 601 F.2d 1116, 1130, (10th Cir. 1979), cert. denied 444 U.S. 995, 100 S.Ct. 530, 62 L.Ed.2d 426 (1979); United States v. Superior Court In and For Maricopa County, 144 Ariz. 265, 697 P.2d 658, 669 (1985); State ex rel. Reynolds v. Lewis, 88 N.M. 636, 545 P.2d 1014, 1015 (1976). The persuasive logic of these courts was well stated by the Arizona Supreme Court:

> "If one thing is clear on this issue, it is that the Enabling Act and the provisions which it required to be inserted in the state constitution were intended to ensure supremacy of federal policy and federal law with regard to Indian land. The federal policy, asserted in the McCarran Amendment, is that the United States is '. . . to represent, as guardian, • • • the Indian tribes in any state court general water rights adjudication proceeding . . .' Jicarilla, supra, 601 F.2d at 1130. There is no clear necessity to read the disclaimer provisions of article 20, ¶ 4 of the state constitution as a cession of exclusive jurisdiction. We prefer, if possible, the interpretation which best serves the purposes and objectives of federal law and federal policy, which we acknowledge as supreme in this area. One of those objectives is that Indian claims to surface waters ordinarily be adjudicated

> in state court as part of a general water rights adjudication, with the United States representing Indian interests. San Carlos, 463 U.S. at [564], 103 S.Ct. at 3212. Unless compelled by unambiguous language, we refuse to interpret the provisions of the Arizona Constitution so restrictively as to defeat federal policy when supremacy of that policy was the very objective Congress sought to accomplish by requiring article 20, ¶ 4 to be part of the organic law of this state." United States v. Superior Court In and For Maricopa County, supra, 697 P.2d at 669. See also Arizona v. San Carlos Apache Tribe, supra, 463 U.S. at 562-563, 103 S.Ct. at 3211; and Comment, supra, 18 Land & Water L. Rev. at 198-199.

Just one court, the Ninth Circuit Court of Appeals, has held a state constitutional disclaimer to be an independent bar to state jurisdiction over Indian water rights. Northern Cheyenne Tribe of Northern Cheyenne Indian Reservation v. Adsit, 668 F.2d 1080 (9th Cir. 1982). But this case was reversed by the United States Supreme Court in Arizona v. San Carlos Apache Tribe of Arizona, supra 463 U.S. 545, 103 S.Ct. 3201, holding that it was not the business of the Ninth Circuit to interpret Montana's disclaimer as a bar to state jurisdiction after the Montana court had decided to exercise jurisdiction:

> "[T]o the extent that a claimed bar to state jurisdiction in these cases is premised on the respective State Constitutions, that is a question of state law over which the state courts have binding authority. Because, in each of these cases, the state courts have taken jurisdiction over the Indian water rights at issue here, we must assume, until informed otherwise, that—at least insofar as state law is concerned—such jurisdiction exists." Id., 463 U.S. at 561, 103 S.Ct. at 3210.

We have never had occasion to consider the effect of the Wyoming disclaimer provision upon a water case.

although it was considered in a civil case involving a collision between a motor vehicle and a horse on the Wind River Indian Reservation. State ex rel. Peterson v. District Court of the Ninth Judicial District, Wyo., 617 P.2d 1056 (1980). There we agreed that the disclaimer provision should be interpreted to be consistent with federal law, stating:

> "McClanahan [v. State Tax Commission of Arizona, 411 U.S. 178, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973)] thus suggests that interpretation of Article 21, Section 26, of the Wyoming Constitution is largely a question of federal law." Id., 617 P.2d at 1067.

We hold that Article 21, § 26 of the Wyoming Constitution only bars state jurisdiction over Indian water rights when federal law also bars that jurisdiction. Congress's policy under the McCarran Amendment is to allow state courts to adjudicate Indian water rights as part of general stream adjudications. Arizona v. San Carlos Apache Tribe of Arizona, supra 463 U.S. at 564-565, 103 S.Ct. at 3212; Cappaert v. United States, 426 U.S. 128, 145-146, 96 S.Ct. 2062, 2073, 48 L.Ed.2d 523 (1976). Because of the McCarran Amendment, there is no federal law which prevents the State from adjudicating the Indian water rights on the Big Horn River System. The district court correctly assumed jurisdiction in this case.

III

IS THERE A RESERVED WATER RIGHT FOR THE WIND RIVER INDIAN RESERVATION?

A. *Preliminary Matters*

1. Preservation of Objections for Review and Standard of Review in General

Rule 53(e)(2), W.R.C.P., provides:

> "(2) In Non-Jury Actions.-In an action to be tried without a jury the court shall accept the master's

> findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court, after hearing, may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

Whether objections to the master's report must be made in the district court to preserve an issue for appeal has not previously been before this court. But, federal courts construing the similar federal rule, F.R.C.P. 53(e), generally hold it unnecessary to make objections to a special master's report. Henry Hanger and Display Fixture Corporation of America v. Sel-O-Rak Corporation, 270 F.2d 635 (5th Cir. 1959); Shima v. Brown, 133 F.2d 48, 49, (D.C. Cir.), cert. denied 318 U.S. 787, 63 S.Ct. 982, 87 L.Ed. 1154 (1943). In Mitchell v. All-States Business Products Corporation, 250 F.Supp. 403, 409 (E.D.N.Y. 1965), the court stated:

> "The Rule provides that 'any party may serve written objections,' but it is not necessary to make objections to the Master's findings as permitted therein. Henry Hanger & Display Fixture Corp. of America v. Sel-O-Rak Corp., 270 F.2d 635 (5th Cir. 1959). The Rule clearly gives the court the power to modify the Master's report upon a motion for action upon the report and the failure of the Secretary to timely serve objections does not limit this power. 5 Moore, Federal Practice ¶ 53.12 [1]. Cf., Bingham Pump Co. v. Edwards, 118 F.2d 338 (9th Cir.), cert. denied, 314 U.S. 656, 62 S.Ct. 107, 86 L.Ed. 525 (1941); United States v. 1,674.34 Acres of Land, More or Less, in Benton County, Arkansas, 220 F. Supp. 893 (W.D.Ark. 1963)."

We consider the federal courts' construction of Rule 53(e), see Centric Corp. v. Drake Bldg. Corp., Wyo., 726 P.2d 1047 (1986); B-T Ltd. v. Blakeman, Wyo., 705 P.2d 307 (1985); and State ex rel. Hopkinson v. District Court, Teton County, Wyo., 696 P.2d 54 (1985), and hold that the district court, absent objection, could review the special master's report. Rule 52(b), W.R.C.P. It is appropriate that this court also review the master's report and actions of the district court. Objections are unnecessary to preserve an issue for appeal.

The bulk of objections made involve the sufficiency of the evidence to support the awards or deletions from claims. When addressing a sufficiency of the evidence question, this court looks only at the evidence most favorable to the prevailing party, giving to it every favorable inference, and leaving out of consideration entirely evidence in conflict therewith. Allstar Video, Inc. v. Baeder, Wyo., 730 P.2d 796, 798 (1986); Wangler v. Federer, Wyo., 714 P.2d 1209, 1216-1217 (1986); Tremblay v. Reid, Wyo., 700 P.2d 391, 392 (1985); City of Rock Springs v. Police Protective Association, Wyo., 610 P.2d 975, 980 (1980).

2. Collateral Estoppel

The doctrine of collateral estoppel prevents relitigation of "issues which were involved actually and necessarily in the prior action between the same parties." Delgue v. Curutchet, Wyo., 677 P.2d 208, 214 (1984). The State of Wyoming is not estopped from litigating the question of intent to reserve water by United States v. Hampleman, No. 753, June 26, 1916 (D. Wyo.), because the court there decided only that the water rights of the Indian allottees were within the exclusive jurisdiction of the United States. The State was not a party to United States v. Parkins, 18 F.2d 642 (D. Wyo. 1926), which indicated water had been reserved for the Indians. The case of Merrill v. Bishop, 74 Wyo. 298, 287 P.2d 620

(1955), does not collaterally estop Wyoming from raising the question of intent to reserve water because the basis of that decision is that the plaintiffs failed to make their case for injunctive relief on the facts; the question of intent to reserve water was, therefore, not involved. It is clear that these cases do not collaterally estop the State of Wyoming from litigating the question of intent to reserve water.

3. Equitable Estoppel

It is claimed that the United States should be equitably estopped from asserting Indian water rights for the reservation because the United States induced settlers to relocate on the ceded reservation lands and other lands in the Division and acquire water rights under state law.

The practice of the United States of obtaining state water permits did not mislead the individual appropriators to believe that the United States would not seek future water rights with an 1868 priority date. The United States should not be estopped from claiming a water right priority date for the future projects which would defeat the rights of other water users. A finding of affirmative misconduct is a prerequisite to invoking the doctrine of equitable estoppel.

This court recognized the element of affirmative misconduct in DeWitt v. Balben, Wyo., 718 P.2d 854, 861-862 (1986) wherein we cited the following:

> "Equitable estoppel or estoppel by misrepresentation is the effect of the *voluntary conduct* of a person whereby he is precluded, both at law and in equity, from asserting rights against another person relying on such conduct; and it arises where a person, by his acts, representations, or admissions, or even by his silence when it is his duty to speak, intentionally or through culpable negligence induces another to believe that certain facts exist, and the other person

rightfully relies and acts on such belief, and will be prejudiced if the former is permitted to deny the existence of such facts." (Emphasis added.) 31 C.J.S. Estoppel § 59, p. 367 (1964). See also Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984) (reasonable reliance on definite misrepresentation to one's detriment required).

It is clear that in order to invoke the doctrine of equitable estoppel against a government or public agency functioning in its official capacity there must be a showing of affirmative misconduct. Greub v. Frith, Wyo., 717 P.2d 323, 326 (1986); Big Piney Oil and Gas Company v. Wyoming Oil and Gas Conservation Commission, Wyo., 715 P.2d 557 (1986). See also United States v. California, 332 U.S. 19, 39-40, 67 S.Ct. 1658, 1668-69, 91 L.Ed. 1489 (1947); Utah Power and Light Co. v. United States, 243 U.S. 389, 405-409, 37 S.Ct. 387, 391, 61 L.Ed. 791 (1917).

In the case at bar, there is no doubt that the United States facilitated settlement of non-Indian lands in Water Division No. 3. In addition, during the period 1905-1908, the United States obtained state water permits for some 145,000 acres of Indian lands on the Wind River Indian Reservation and began construction of the irrigation project. Judge Johnson was correct in concluding that none of this indicates affirmative misconduct on the part of the United States.

4. Burden of Proof

The record is unclear as to which party was given the burden of proof with respect to the existence of a reserved water right. Insofar as the special master may have placed the burden of establishing its claims to water on the United States, he did not err. It is well established that "[t]he burden of proof is on the party asserting the affi mative of any issue. Morrison v. Reilly, Wyo., 511

P.2d 970 (1973)." Osborn v. Manning, Wyo., 685 P.2d 1121, 1124 (1984). See e.g., Younglove v. Graham and Hill, Wyo., 526 P.2d 689, 693 (1974) (burden of proof is on one asserting an affirmative defense); Hawkeye-Security Insurance Company v. Apodaca, Wyo., 524 P.2d 874, 879 (1974) (burden of showing an exception to statute of limitations is on the one claiming the exception). Here, the Tribes and the United States asserted "affirmative claims" to reserved water rights for the Indians. The master accepted the Tribes' proposal that the parties be realigned, ordering that the United States and the Tribes be realigned as plaintiffs.

The McCarran Amendment did not contemplate that the United States would be absolved from the usual burdens once it was joined in litigation. "If we were sued, we would have to prove * * * our Indian Rights * * *." Hearings Before Subcommittee of the Committee on the Judiciary, United States Senate, 82d Cong., 1st Sess., on S. 18, 1951 at 7. The United States has been required to establish its reserved water rights. United States v. New Mexico, 438 U.S. 696, 705, 98 S.Ct. 3012, 3016, 57 L.Ed.2d 1052 (1978); Arizona v. California, 373 U.S. 546, 598, 83 S.Ct. 1468, 1497, 10 L.Ed.2d 542 (1963); Arizona v. California, 460 U.S. 605, 638, 103 S.Ct. 1382, 1401, 75 L.Ed.2d 318 (1983). Block v. North Dakota ex rel. Board of University and School Lands, 461 U.S. 273, 288, 103 S.Ct. 1811, 1820, 75 L.Ed.2d 840 (1983) does not undercut these cases, because nothing indicates that the McCarran Amendment attaches any condition that the United States be relieved from ordinary burdens of proof in litigation.

The special master could not have erred in requiring the Tribes and the United States to substantiate their claim that water had been reserved for the Wind River Indian Reservation. Because they prevailed on this issue, they were not harmed in any event.

B. *Was There an Intent to Reserve Water?*

1. Analysis Below

Both the special master and the district court undertook the rigorous analysis called for by United States v. New Mexico, supra 438 U.S. at 700, 98 S.Ct. at 3014: "Each time this Court has applied the 'implied-reservation-of-water doctrine,' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated."

In determining that there was intent to reserve water for the reservation, the special master looked to the treaty, the decision of Winters v. United States, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), and the act admitting Wyoming to the Union. He "analyzed the 348 'Intent and Purposes' exhibits offered by the State of Wyoming, along with the competent argument of counsel for the State of October 7, 1981, supporting the position that no reservation of water exists." The master also studied Merrill v. Bishop, supra 287 P.2d 620. The foregoing indicates quite clearly that the special master did not blindly presume a reserved water right existed, but that he examined the law and the evidence relating to intent and simply found against the State.

Nor did the district court blindly presume intent to reserve water. Judge Joffe adopted the report of the special master with some exceptions. He rejected the State's argument that there was no intent to reserve water because it would not only run counter to his interpretation of the intent of Congress but it would also run counter to controlling law on the subject. Judge Johnson adopted Judge Joffe's decision on intent to reserve water.

2. The Appeal

a. Intent to Reserve Water in 1868

The treaty establishing the Wind River Indian Reservation, signed on July 3, 1868, ratified on February 16, 1869, and proclaimed on February 24, 1869, Treaty of Ft. Bridger, 15 Stat. 673 (1869), is silent on the subject of water for the reservation. Yet both the district court and the special master found an intent to reserve water. We affirm.

The case of Byers v. Wa-Wa-Ne, 86 Or. 617, 169 P. 121, 127 (1917), does not support Wyoming's position that because the Wind River Indians did not need water in 1868, there is no basis for implying a reserved water right. Unlike the lands involved in Byers, the lands in the case at bar did require water to produce crops in 1868. In addition, Byers prevailed in that case because her competing water right was granted by Congress. Id., 169 P. at 122-123.

Congress, by passing the settlement acts, intended non-Indian settlers to obtain water rights. An award of Indian reserved water rights would damage the interests the settlers had established under state law. The settlement acts do not, however, simply by recognizing that water is important to settlers, indicate that water was not important to the Indians as well. Nor do the acts indicate that Congress did not intend to reserve necessary water for the Indians.

In 1890, Wyoming was admitted to the United States. The act provided that "Wyoming * * * is hereby declared admitted to the union on an equal footing with the original States in all respects whatever; and that the constitution which the people of Wyoming have formed for themselves be, and the same is hereby, accepted, ratified, and confirmed." 26 Stat. 222, 51st Cong., Sess. I, ch. 664 (1890). Section 2 of the act provided that the

Act of Admission did not affect the reservation of Yellowstone National Park nor the right and ownership of the United States to the park. Id. The constitution which was adopted provided that "[t]he water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the State." Wyoming Constitution, Art. 8, § 1. It also provided that "[p]riority of appropriation for beneficial uses shall give the better right." Article 8, § 3. In addition, the constitution disclaimed jurisdiction over Indian lands. Wyoming Constitution, Art. 21, § 26.

This court's decision in Merrill v. Bishop, supra, 287 P.2d 620, while indicating that the admission had impacted the rights of successors to allottees in the ceded portions of the reservation, did not decide the question of intent to reserve water, but held only that the allottees' successors failed to prove the facts necessary for an injunction. The United States District Court for the District of Wyoming, on the other hand, has twice indicated that the treaty did reserve water for the Indians, both cases being decided after Wyoming was admitted to the Union. United States v. Hampleman, supra No. 753, June 26, 1916; and United States v. Parkins, supra 18 F.2d 642. The United States Supreme Court has said:

> "The Court has previously concluded that whatever powers the States acquired over their waters as a result of congressional Acts and admission into the Union, however, Congress did not intend thereby to relinquish its attorney authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for specific federal purposes." United States v. New Mexico, supra 438 U.S. at 698, 98 S.Ct. at 3013.

The Gila National Forest was set aside in 1899, before New Mexico was admitted to the Union. Thus, the federal courts have determined that admission acts do not

indicate that Congress abandoned reserved water rights. The fact that the admission act reserved to the United States jurisdiction and ownership of Yellowstone National Park but is silent as to the Wind River Indian Reservation in no way detracts from our conclusion.

The equal footing clause contained in the Act of Admission does not evidence an intent not to reserve water. The equal footing doctrine argument was rejected in United States v. District Court in and For County of Eagle, Colorado, 401 U.S. 520, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971) (U.S. can reserve water before or after admission). See also United States v. Texas, 339 U.S. 707, 70 S.Ct. 918, 94 L.Ed. 1221 (1950) (equal footing clause refers only to political rights and sovereignty). The fact that the irrigability of Wyoming was an important factor in the decision to admit it does not indicate that anyone intended to deprive the Indians of the advantage of water.

We now hold that, examining the Act of Admission and the constitution as a whole, and considering more recent federal pronouncements on the issue, the admission of Wyoming to the Union did not evidence an intent by Congress not to reserve water for the reservation.

The fact that the pre-Winters years evidenced some uncertainty in the status of Indian water rights negatives the notion that actions during these years were indicative of an intent not to reserve water for the Wind River Indian Reservation. The master was correct in determining that the uncertain acts between 1902 and 1908 reflect only the uncertainty in the law, not an intent not to reserve water.

The Second McLaughlin Agreement, Treaty of April 21, 1904, Act of March 3, 1905, 33 Stat. 1016, does not evidence an intent not to reserve water for the reservation. The Indians were eager to secure their water rights, Minutes of Council, Shoshone Agency, April 19,

1904, at 19, and understood that the agreement would make their water rights firm. Id. at 22. The agreement contained the following provisions:

> "The said Indians belonging on the Shoshone or Wind River Reservation * * * do hereby cede, grant, and relinquish to the United Statse, all right, title, and interest they may have to all the lands embraced within the reservation, except [certain lands]." Article 1.
>
> "The balance [of $85,000, after per capita payments, estimated to be approximately $2,000] shall be devoted to surveying, platting, making of maps, payment of fees, and performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians * * *." Article 3 "[One hundred and fifty thousand dollars was authorized] for the construction and extension of an irrigation system within the diminished reservation for the irrigation of the lands of the said Indians * * *." Article 4.
>
> "It is further understood that nothing in this agreement shall be construed to deprive the said Indians of the Shoshone or Wind River Reservation, Wyoming, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement." Article 10.

A reservation of water with an 1868 priority date is not inconsistent with the permit provisions of the pre-Winters 1905 Act. The rejection of the provision which would have given the Indians a grace period in which to secure their own permits for allotments on the ceded portion of the reservation, H.R. Rep. No. 3700, 58th Cong., 3d Sess. (1905), is no indication there was never any intent to reserve water for the Indians, but only of fear that it would delay settlement of the area opened. S. Rep. No. 4263, 58th Cong., 3rd Sess. (1905).

The fact that contemporary agreements indicate that the United States knew how to reserve water for Indians is of marginal relevance. Congress also knew how to express a relinquishment of reserved water rights. See First McLaughlin Agreement, or Thermopolis Purchase, supra, Article 1 (Tribes surrender "all their right, title, and interest of every kind and character" to water rights appurtenant to ceded lands). It is well established that Congress must use such explicit statutory language in order to abrogate treaty rights. Oneida County, N.Y. v. Oneida Indian Nation of New York State, 470 U.S. 226, 247, 105 S.Ct. 1245, 1258, 84 L.Ed.2d 169 (1985), citing Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 690, 99 S.Ct. 3055, 3077, 61 L.Ed.2d 823 (1979) and Menominee Tribe of Indians v. United States, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). Cf., Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586, 97 S.Ct. 1361, 1363, 51 L.Ed.2d 660 (1977).

Inconsistent actions by the United States do not evidence an intent not to reserve water. After the 1905 Act was passed, the United States did seek and obtain state water permits for Indian land and continued to seek permits while asserting reserved water rights for the reservation after Winters v. United States, supra, 207 U.S. 564, 28 S.Ct. 207 (1908) was decided. The United States more strongly asserted its reserved water rights when, in 1910, it refused to apply to the State for an extension of time in which to complete the irrigation project authorized by the 1905 Act. It was in 1911 that Water Commissioner Hampleman first closed the headgates on an allottee's ditches claiming that she had no valid state permit. Ultimately the case which arose from his actions was decided in favor of the Indians in 1916. In the meantime, in 1914, Congress rejected a provision which would have protected water rights for allotments: "Any invasion of a prior right of the United States to the waters of a stream is a trespass, and the Government

may maintain a suit in equity to protect its right against any or all such trespassers." 1913 H.R. 12579, Indian Appropriations Bill, Subcommittee of the Committee on Indian Affairs of the House of Representatives. That this provision, sought to be attached to the 1914 Appropriations Act, 38 Stat. 582, was not enacted into law is no indication that there was no intent to reserve water; the amendment could not be enacted because it was ruled out of order.

Nor do other cited actions evidence an intent not to reserve water. In 1926, the federal district court announced its decision in United States v. Parkins, supra 18 F.2d 642, finding against a successor to an allottee who had been diverting water without authority. In a 1939 act appropriating a fund for the Shoshone Tribe, Congress authorized the Secretary of the Interior to establish land use districts within the ceded and nonceded lands and to acquire, exchange and consolidate lands and water rights. In 1953, Congress appropriated funds constituting final payment, pursuant to the 1905 Act, for certain lands withdrawn and reserved under the 1902 Reclamation Act. In 1955, the Wyoming Supreme Court decided the case of Merrill v. Bishop, supra 287 P.2d 620, in favor of the State and against allottees' successors. These actions are not sufficient proof of intent not to reserve water for the Indians.

b. Subsequent Abrogation

What we have said above disposes of the contention that even if the treaty did reserve water for the Wind River Indian Reservation in 1868, the right to water was abrogated by the 1890 Act of Admission and/or the 1905 Act. If the actions are not sufficient evidence to show there never was any intent to reserve water, they are not sufficient to make the even stronger showing that such an established treaty right has been abrogated. The

district court did not err in finding a reserved water right for the Wind River Indian Reservation.

c. Sensitivity Doctrine

The sensitivity doctrine does not apply to the question of intent to reserve water. United States v. New Mexico, supra, 438 U.S. 704, 98 S.Ct. at 3016. At any rate, both the special master and the district court were sensitive to existing water rights in determining there was an intent to reserve water for the Wind River Indian Reservation.

IV

PURPOSES OF THE WIND RIVER INDIAN RESERVATION

The government may reserve water from appropriation under state law for use on the lands set aside for an Indian reservation. Winters v. United States, supra 207 U.S. 564, 28 S.Ct. 207. A reserved water right is implied for an Indian reservation where water is necessary to fulfill the purposes of reservation. United States v. Adair, 723 F.2d 1394, 1409 (9th Cir. 1983), cert. denied sub nom. Oregon v. United States, 467 U.S. 1252, 104 S.Ct. 3536, 82 L.Ed.2d 841 (1984). The quantity of water reserved is the amount of water sufficient to fulfill the purpose of the lands set aside for the reservation. See, e.g., Cappaert v. United States, supra 426 U.S. at 138, 96 S.Ct. 2069, and 426 U.S. at 141, 96 S.Ct. at 2071 (relying on Arizona v. California, supra 373 U.S. at 600-601, 83 S.Ct. at 1497-1498, 10 L.Ed.2d at 578-579 (to the same effect)); United States v. New Mexico, supra 438 U.S. at 698, 98 S.Ct. at 3013. Congress can reserve water for lands withdrawn for specific federal purposes. Winters v. United States, supra 207 U.S. 564, 28 S.Ct. 207; Arizona v. California, supra 373 U.S. at 597-598, 93 S.Ct. at 1496; Colville Confederated Tribes v. Walton, 647 F.2d 42, 46 (9th Cir.), cert. denied 454 U.S.

1092, 102 S.Ct. 657, 70 L.Ed.2d 630 (1981), cert. denied 475 U.S. 1010, 106 S.Ct. 1183, 89 L.Ed.2d 300 (1986). We have already decided that Congress intended to reserve water for the Wind River Indian Reservation when it was created in 1868, and we accept the proposition that the amount of water impliedly reserved is determined by the purposes for which the reservation was created.

The special master's finding that the principal purpose for the creation of the reservation was to provide a permanent homeland for the Indians is not a factual determination. The master determined the purpose of the Indian reservation from the face of the treaty as a matter of law. Where the contract is unambiguous, the meaning or intent is derived from the instrument itself as a matter of law. Rouse v. Munroe, Wyo., 658 P.2d 74, 77 (1983); Goodwin v. Upper Crust of Wyoming, Inc., Wyo., 624 P.2d 1192, 1195 (1981); Amoco Production Company v. Stauffer Chemical Company of Wyoming, Wyo., 612 P.2d 463, 465 (1980); Goodman v. Kelly, Wyo., 390 P.2d 244, 247 (1964). The legal principles applicable to the interpretation of contracts apply also to interpretation of Indian treaties. Washington v. Washington State Commercial Passenger Fishing Vessel Association, supra 443 U.S. at 675, 99 S.Ct. at 3069. The purposes of a treaty are ascertained by utilizing rules for determining the intent of parties to a contract. Sullivan v. Kidd, 254 U.S. 433, 439, 41 S.Ct. 158, 160, 65 L.Ed. 344 (1921). The special master found as a matter of law that the treaty was unambiguous and ascertained the purpose for creation of the reservation from the four corners of the treaty, stating:

> "Analyzing the Treaty in its entirely, with specific reference to the above cited provisions, it is not at all unreasonable to conclude that the principal purpose for entering into this Treaty was to provide the Indians with a homeland where they could establish a permanent place to live and to develop their civiliza-

> tion just as any other nation throughout history has been able to develop its civilization."

The district court ascertained the purpose of the reservation from the treaty itself, stating: "On the very face of the Treaty, it is clear that its purpose was purely agricultural." This legal determination is fully reviewable by this court.

A. *The Treaty*

The Treaty with the Shoshone and Bannacks, July 3, 1868, provides in pertinent part:

> "ARTICLE I. From this day forward, peace between the parties to this treaty shall forever continue. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it.
>
> * * * * *
>
> "ARTICLE II. It is agreed that whenever the Bannacks desire a reservation to be set apart for their use, or whenever the President shall deem it advisable * * *, he shall cause a suitable one to be selected for them in their present country * * *. The United States further agrees that the following district of county * * * shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshone Indians herein named, and for such other friendly tribes as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the

territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

"ARTICLE III. The United States agrees * * * to construct * * * a warehouse or storeroom * * *; an agency building for the residence of the agent * * *; a residence for the physician * * *; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer * * *; also a schoolhouse or mission building * * *.

"The United States agrees further to cause to be erected * * * a good steam circular sawmill, with a grist-mill and shingle machine attached * * *.

"ARTICLE IV. The Indians herein named agree * * * they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as place subsists * * *.

* * * * *

"ARTICLE VI. If any individual belonging to said tribes * * * shall desire to commence farming, he shall have the privilege to select * * * a tract of land within the reservation of his tribe * * * which tract * * * shall cease to be held in common * * *.

* * * * *

"ARTICLE VII. In order to insure the civilization of the tribes entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said *agricultural reservations* * * *.

"ARTICLE VIII. When the head of a family or lodge shall have selected lands and received his cer-

tificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year * * * and for each succeeding year he shall continue to farm, for a period of three years more * * *.

"And it is further stipulated that such persons as commence farming shall receive instructions from the farmers * * * and whenever more than one hundred persons on either reservation shall enter upon the cultivation of the soil, a second blacksmith shall be provided * * *.

"ARTICLE IX. * * * the United States agrees to deliver at the agency house on the reservation [items of clothing].

"* * * and in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian roaming and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper.

* * * * *

"ARTICLE XII. It is agreed that the sum of five hundred dollars annually for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe, who in the judgment of the agent, may grow the most valuable crops for the respective year." (Emphasis added.)

The court in Colville Confederated Tribes v. Walton, supra 647 F.2d 42, did not mandate that a single purpose for the reservation be found. Rather, the court applied the specific purpose test outline in United States v.

New Mexico, supra 438 U.S. at 702, 98 S.Ct. at 3015, in an Indian reserved water case and found two primary purposes: "to provide a homeland for the Indians to maintain their agrarian society," 647 F.2d at 47, for which practicably irrigable acreage was the measure, and to preserve the "tribes' access to fishing grounds." 647 F.2d at 48. See also Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Flathead Irrigation and Power Project, 616 F. Supp. 1292, 1297 (D. Mont. 1985). The validity of the ninth circuit's application of the New Mexico test has been drawn into question because the standards governing non-Indian federal reserved water rights differ from those governing Indian reserved water rights. F. Cohen, Handbook of Federal Indian Law, ch. 10 § 133, at 583-584 (1982 ed.); State ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation, Mont., 712 P.2d 754, 766-767 (1985). See also Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 105 S.Ct. 2399, 2404, 85 L.Ed.2d 753 (1985). In United States v. Adair, supra 723 F.2d at 1408, the ninth circuit agreed that non-Indian federal reservation reserved water rights cases only provide useful guidelines to Indian reserved water rights.

The following cases are not authority for limiting reserved water for a permanent homeland reservation to irrigation because the only reserved water rights sought were for irrigation and related uses: Winters v. United States, supra 207 U.S. 564, 28 S.Ct. 207; United States ex rel. Ray v. Bibner, 27 F.2d 909 (D.C. Idaho 1928); Skeem v. United States, 273 F. 93 (C.C.A. Idaho 1921); United States v. Powers, 305 U.S. 527, 533, 59 S.Ct. 344, 83 L.Ed.2d 330 (1939). See also Anderson v. Spear-Morgan Livestock Company, 107 Mont. 18, 79 P.2d 667, 669 (1938) (dicta indicates only an implied reservation for irrigation, but does not address the question of reservation of water for other uses).

It is well established that the judgment of the district court will be upheld for any proper reason appearing of

record. Anderson v. Bauer, Wyo., 681 P.2d 1316 (1984); Mentock v. Mentock, Wyo., 638 P.2d 156 (1981). Considering the well-established principles of treaty interpretation, the treaty itself, the ample evidence and testimony addressed, and the findings of the district court, we have no difficulty affirming the finding that it was the intent at the time to create a reservation with a sole agricultural purpose. Indian treaties should be interpreted generously, Oneida County, N.Y. v. Oneida Indian Nation of New York State, supra, 470 U.S. at 247, 105 S.Ct. at 1258; Carpenter v. Shaw, 280 U.S. 363, 366-367, 50 S.Ct. 121, 122, 74 L.Ed. 478 (1930), and liberally in favor of the Indians, United States v. Shoshone Tribe, 304 U.S. 111, 117, 58 S.Ct. 794, 798, 82 L.Ed. 1213 (1938); Winters v. United States, supra 207 U.S. 564, 28 S.Ct. 207; McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 174, 93 S.Ct. 1257, 1263, 36 L.Ed.2d 129 (1973); Washington v. Washington State Commercial Passenger Fishing Vessel Association, supra 443 U.S. at 676, 99 S.Ct. at 3069; State ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation, supra 712 P.2d at 762-763, United States v. Adair, supra 723 F.2d at 1413; United States v. Lower Elwha Tribe, 642 F.2d 1141, 1144 (9th Cir.), cert. denied sub nom. Makah Indian Tribe v. Lower Elwha Tribe, 454 U.S. 862, 102 S.Ct. 320, 70 L.Ed.2d 161 (1981), and should not be given a crabbed or restrictive meaning. McClanahan v. State Tax Commission of Arizona, supra 411 U.S. at 176, 93 S.Ct. at 1264. Nor should treaties be improperly construed in favor of Indians, for "'[W]e cannot remake history,'" Rosebud Sioux Tribe v. Kneip, supra 430 U.S. at 615, 97 S.Ct. at 1377, citing DeCoteau v. District County Court for Tenth Judicial District, 420 U.S. 425, 449, 95 S.Ct. 1082, 1095, 43 L.Ed.2d 300 (1975); In Re Wilson, 30 Cal.3d 21, 36, 177 Cal. Rptr. 336, 346, 634 P.2d 363, 372 (1981) (citing same case), and courts should not distort the words of a treaty to find rights inconsistent with its

language. Ward v. Race Horse, 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 (1896).

Article 7 of the treaty refers to "said agricultural reservations." Article 6 authorizes allotments for farming purposes; Article 8 provides seeds and implements for farmers; in Article 9 "the United States agreed to pay each Indian farming a $20 annual stipend, but only $10 to 'roaming' Indians"; and Article 12 establishes a $50 prize to the ten best Indian farmers. The treaty does not encourage any other occupation or pursuit. The district court correctly found that the reference in Article 4 to "permanent homeland" does nothing more than permanently set aside lands for the Indians; it does not define the purpose of the reservation. Rather, the purpose of the permanent-home reservation is found in Articles 6, 8, 9, and 12 of the treaty.

The emphasis on education for Indians settled on "said agricultural reservations," in Article 7 also helps to define the purpose of the reservation. Those words do not refer only to the farm tracts selected by individual Indians under Article 6, but to the two Indian reservations authorized by the treaty—for the Shoshone in Wyoming (Wind River) and for the Bannack in Utah (Fort Hall). Other treaties have emphasized the importance of education in somewhat different language. See, e.g., Treaty with the Ute Tribe, March 2, 1868, 15 Stat. 619, Article 8; Treaty with the Navajo Tribe, June 1, 1868, 15 Stat. 667, Article 6; Treaty of Fort Laramie with the Cheyenne and Arapahoe, May 10, 1868, 15 Stat. 655, Article 4; Treaty of Fort Laramie with the Crow, May 7, 1868, 15 Stat. 649, Article 7. The thrust of all these provisions is that education is especially important for those Indians who are settled and engaged in agriculture and are no longer roaming. Thus, while Article 7 of the instant treaty emphasizes the importance of education for Indians engaged in farming, "said agricultural reservations" does have a broader meaning—that the two Indian reservations were to be agricultural.

Although the treaty did not force the Indians to become farmers and although it clearly contemplates that other activities would be permitted (hunting is mentioned in Article 4, lumbering and milling in Article 3, roaming in Article 9), the treaty encouraged only agriculture, and that was its primary purpose. The Court in United States v. Shoshone Tribe of Indians, supra 304 U.S. 111, 58 S.Ct. 794, discussing the purpose of this treaty, stated:

> "Provisions in aid of teaching children and of adult education in farming, and to secure for the tribe medical and mechanical service, to safeguard tribal and individual titles, when taken with other parts of the treaty, plainly evidence purpose on the part of the United States to help to create an independent permanent farming community upon the reservation." Id., 304 U.S. at 117-118, 58 S.Ct. at 798.

The Court, while recognizing that the Tribes were the beneficial owners of the reservation's timber and mineral resources, id., 304 U.S. at 117, 58 S.Ct. at 798, and that it was known to all before the treaty was signed that the Wind River Indian Reservation contained valuable minerals, nonetheless concluded that the purpose of the reservation was agricultural. The fact that the Indians fully intended to continue to hunt and fish does not alter that conclusion. October 4, 1868 Report to the President of the Indian Peace Commission; Report of Wyoming Territory Superintendent of Indian Affairs, October 11, 1870. See also Williams, Personal Recollections of Wash-A-Kie, Chief of the Shoshones, 1 Utah Historical Quarterly 101, 104 (1928) (the Shoshone left the reservation both before and after the treaty for better hunting and fishing grounds in Utah).

Agreements subsequent to the treaty acknowledge the continuance of non-agricultural activities on the reservation. The Brunot Agreement of 1872, 18 Stat. 291, 292, 43rd Cong., Sess. II, ch. 2 (1874); 1904 McLaughlin Agreement, Act of March 3, 1905, 33 Stat. 1016; 1896

Agreement, 30 Stat. 93. The reports of the Indian agents are replete with descriptions of and plans for other activities. Yet not one of the cited reports neglects to report also on the progress of the farming and ranching operations. The primary activity was clearly agricultural.

B. *Fisheries*

Reserved water rights for fisheries have been recognized where a treaty provision explicitly recognized an exclusive right to take fish on the reservation or the right to take fish at traditional off-reservation fishing grounds, in common with others. United States v. Winans, 198 U.S. 371, 384, 25 S.Ct. 662, 665, 49 L.Ed. 1089 (1905); Byers v. Wa-Wa-Ne, supra 169 P. at 122; United States v. Adair, supra 723 F.2d at 1408; Puyallup Tribe, Inc. v. Washington Department of Game of Washington, 433 U.S. 165, 175, 97 S.Ct. 2616, 2622, 53 L.Ed.2d 667 (1977); United States v. Lower Elwha Tribe, supra 642 F.2d at 1147; Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Flathead Irrigation and Power Project, supra 616 F. Supp. at 1294; Washington v. Washington State Commercial Passenger Fishing Vessel Association, supra 443 U.S. at 661, 99 S.Ct. at 3062.

Instream fishery flows have also been recognized where the Indians were heavily, if not totally, dependent on fish for their livelihood. United States v. Adair, supra 723 F.2d at 1409; Colville Confederated Tribes v. Walton, supra 647 F.2d at 48. In the case at bar, the Tribes introduced evidence showing that fish had always been part of the Indians' diet. The master, erroneously concluding that a reserved right for fisheries should be implied when the tribe is "at least partially dependent upon fishing," awarded an instream flow right for fisheries. The district court, however, finding neither a dependency upon fishing for a livelihood nor a traditional lifestyle

involving fishing, deleted the award. The district court did not err. The evidence is not sufficient to imply a fishery flow right absent a treaty provision.

C. *Mineral and Industrial*

The Tribes were denied a reserved water right for mineral and industrial development. All parties to the treaty were well aware before it was signed of the valuable mineral estate underlying the Wind River Indian Reservation. October 4, 1686, Report of Brevet Major C.C. Augur to the President of the Indian Peace Commission; Brunot Agreement, 18 Stat. 291, 292, 43rd Cong., Sess. II, ch. 2 (1874), United States v. Shoshone Tribe of Indians, supra 304 U.S. 111, 58 S.Ct. 794. The question of whether, because the Indians own the minerals, the intent was that they should have the water necessary to develop them must be determined, of course, by the intent in 1868. Neither the Tribes nor the United States has cited this court to any provision of the treaty or other evidence indicating that the parties contemplated in 1868 that a purpose of the reservation would be for the Indians to develop the minerals. The fact that the Tribes have since used water for mineral and industrial purposes does not establish that water was impliedly reserved in 1868 for such uses. The district court did not err in denying a reserved water right for mineral and industrial uses.

D. *Municipal, Domestic and Commercial*

A reserved water right for municipal, domestic and commercial uses was included within the agricultural reserved water award. Domestic and related use has traditionally been subsumed in agricultural reserved rights. See, e.g., United States ex rel. Ray v. Hibner, supra 27 F.2d at 911 (the treaties fixed the rights of the Indians—"to a continuous use of a sufficient amount of water for the irrigation of their lands, and domestic pur-

poses"); United States v. Powers, supra 305 U.S. at 533, 59 S.Ct. at 347 ("waters essential to farming and home making"). Practicably irrigable acreage (PIA) was established as the measure of an agricultural reserved water right in Arizona v. California, supra 373 U.S. at 601, 83 S.Ct. at 1498. The special master there indicated that PIA was the measure of water necessary for agriculture and related purposes. Report from Simon H. Rifkind, Special Master, to the Supreme Court 265-266 (December 5, 1960) quoted in Colville Confederated Tribes v. Walton, supra 647 F.2d at 48. The court properly allowed a reserved water right for municipal, domestic, and commercial use.

E. *Livestock*

For the reasons stated above, the district court did not err in finding a sole agricultural purpose for the reservation or in subsuming livestock use within that purpose.

F. *Wildlife and Aesthetics*

The special master awarded 60% of historic flows for wildlife and aesthetic uses, consistent with his determination that the purpose of the reservation was to be a permanent homeland. The district court deleted this award, reciting not only that the purpose was solely agricultural, but that insufficient evidence had been presented to justify an award for these uses. The district court did not err in holding that the Tribes and the United States did not introduce sufficient evidence of a tradition of wildlife and aesthetic preservation which would justify finding this to be a purpose for which the reservation was created and for which water was impliedly reserved.

The district court did not err in finding a sole agricultural purpose in the creation of the Wind River Indian Reservation. The Treaty itself evidences no other purpose, and none of the extraneous evidence cited is sufficient to attribute a broader purpose.

V

SCOPE OF THE RESERVED WATER RIGHT

A. *Groundwater*

The logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater. See Tweedy v. Texas Company, 286 F. Supp. 383, 385 (D. Mont. 1968) ("whether the [necessary] waters were found on the surface of the land or under it should make no difference"). Certainly the two sources are often interconnected. See § 41-3-916, W.S. 1977 (where underground and surface waters are "so interconnected as to constitute in fact one source of supply," a single schedue of priorities shall be made); Final Report to the President and to the Congress by the National Water Commission, Water Policies for the Future 233 (1973) (groundwater and surface water "often naturally related"); Cappaert v. United States, supra 426 U.S. at 142-143, 96 S.Ct. at 2071 (citing additional authority to this effect).

Acknowledging the above, we note that, nonetheless, not a single case applying the reserved water doctrine to groundwater is cited to us. The ninth circuit indicated that groundwater was reserved in United States v. Cappaert, 508 F.2d 313, 317 (9th Cir. 1974). The United States Supreme Court, however, found the water in the pool reserved for preservation of the pupfish was not groundwater but surface water, protected from subsequent diversions from either surface or groundwater supplies. Cappaert v. United States, supra 426 U.S. at 143, 96 S.Ct. at 2071. Nor have the other cases cited to us granted a reserved right in underground water. In Colville Confederated Tribes v. Walton, supra 647 F.2d 42, there is slight mention of the underground aquifer and of pumping wells, Id. at 52, but the opinion does not indicate that "their wells" are a source of reserved water

or even discuss a reserved groundwater right. Tweedy v. Texas Company, supra 286 F. Supp. 383, did not recognize a reserved groundwater right. Pueblo water rights, which include not only surface water but also groundwater "interrelated to the surface water as an integral part of the hydrologic cycle," State of New Mexico ex rel. Reynolds v. Aamodt, 618 F. Supp. 993, 1010 (D.N.M. 1985), do not apply here.

The district court did not err in deciding there was no reserved groundwater right. Because we hold that the reserved water doctrine does not extend to groundwater, we need not address the separate claim that the district court erred in determining that the State owns the groundwater. The State has not appealed the decision that the Tribes may continue to satisfy their domestic and livestock needs (part of the agricultural award) from existing wells at current withdrawal rates; therefore, we do not address that question.

B. *Exportation*

The district court held that "[t]he Tribes can sell or lease any part of the water covered by their reserved water rights but the said sale or lease cannot be for exportation off of the Reservation." The Tribes did not seek permission to export reserved water, and the United States concedes that no federal law permits the sale of reserved water to non-Indians off the reservation. Because of our holding on the groundwater issue, we need not address the separate constitutional attack on the prohibition of exportation of groundwater.

C. *Finality*

The instant decree made no provision for future modification. In Article 9 of the decree in Arizona v. California, the Court retained "jurisdiction of this suit for the purpose of any order, direction, modification of the decree, or any supplementary decree." Arizona v. Cali-

fornia, supra 460 U.S. at 617-618, 103 S.Ct. at 1391. The Court explained that "the Article was mainly a safety net added to retain jurisdiction and to ensure that we had not, by virtue of res judicata, precluded ourselves from adjusting the decree in light of unforeseeable changes in circumstances." Id., 460 U.S. at 622, 103 S.Ct. at 1393.

The statute authorizing this general adjudication, § 1-37-106, W.S. 1977, is in the Uniform Declaratory Judgments Act. Section 1-37-102, W.S. 1977, provides that "such declarations shall have the effect of a final judgment." Section 1-37-114, W.S. 1977, provides: "The Uniform Declaratory Judgments Act is remedial. Its purposes is to settle and to afford relief from uncertainty and insecurity * * *." This court has said that the separate statutory provisions for stream adjudications "evince the legislative purpose peradventure of cavil that the adjudication of a water right in favor of a claimant shall be final and binding, and that no further rights may be claimed by him over and above the award made in the adjudication." Campbell v. Wyoming Development Company, 55 Wyo. 347, 100 P.2d 124, 137, reh. denied 102 P.2d 745 (1940). We conclude that finality in this litigation is appropriate.

The Tribes have several avenues available to them should unforeseen future problems develop. Rule 60(a), W.R.C.P., provides relief from clerical errors. Rule 60(b), W.R.C.P., provides relief from other mistakes. In addition, § 1-37-110, W.S. 1977, provides supplemental relief:

> "Further relief based on a declaratory judgment may be granted. * * * If the application is sufficient the court, on reasonable notice, shall require any adverse party whose rights have been adjudicated by the declaratory judgment to show cause why further relief should not be granted."

Clearly the district court did not need to retain jurisdiction as a "safety net."

VI

QUANTIFICATION

A. *The Measure*

The measure of the Tribes' reserved water right is the water necessary to irrigate the practicably irrigable acreage on the reservation. In Arizona v. California, supra 373 U.S. at 600-601, 83 S.Ct. at 1498, a needs test was rejected as too uncertain, the Court opting instead for practicably irrigable acreage as the measure of a tribal agicultural reserved water right. Two subsequent non-Indian reserved water right cases, Cappaert v. United States, supra 426 U.S. 128, 96 S.Ct. 2067, and United States v. New Mexico, supra 438 U.S. at 702, 98 S.Ct. at 3015, indicate that necessity is the measure of a reserved water right. And in Washington v. Washington State Commercial Passenger Fishing Vessel Association, supra 443 U.S. at 686-687, 99 S.Ct. at 3075, the Court recognized the propriety of reducing the Indians' proportion of the fish harvest as their needs diminished. Nonetheless, the Court declined the invitation to reexamine the PIA standard in Arizona v. California, supra 460 U.S. at 625-626, 103 S.Ct. at 1394-1395, and reaffirmed the value of the certainty inherent in the practicably irrigable acreage standard. The district court was correct in quantifying the Tribes' reserved water right by the amount of water necessary to irrigate all of the reservation's practicably irrigable acreage.

B. *Future Lands*

The Tribes and the United States claimed a reserved water right for lands on the reservation not yet developed for irrigation, but which were in their view, practicably irrigable acreage. Counsel for the State, the Tribes and the United States agreed upon a definition of practicably irrigable acreage: "those acres susceptible to sustained irrigation at reasonable costs." The deter-

mination of practicably irrigable acreage involves a two-part analysis, i.e., the PIA must be susceptible of sustained irrigation (not only proof of the arability but also of the engineering feasibility of irrigating the land) and irrigable "at reasonable cost."

The United States presented evidence on all these factors to support its ultimate claim for 53,760 practicably irrigable acres (210,000 acre-feet/year), and Wyoming presented evidence in opposition. The special master recommended the following award of reserved water rights for future projects:

North Crowheart	34,993 acres
South Crowheart	4,238 acres
Arapahoe	3,437 acres
Riverton East	3,442 acres
Big Horn Flats	2,410 acres
	48,520 acres

The Amended Judgment and Decree corrected the Riverton East figure by reducing it to 3,019 acres, which resulted in the total final award being 48,097 acres.

1. Arability

Over Wyoming's objection that the land classes did not consider economic factors and were not sufficiently specific, the master adopted this system:

> "*Class 1*: Class 1 lands are of high quality for irrigation, and will yield high returns with minimum production and management costs.
>
> "*Class 2*: Class 2 lands are good quality with only minor deficiencies.
>
> "*Class 3*: Class 3 consists of fair quality lands having more serious deficiencies than Class 2 lands.

> "*Class 4*: Class 4 lands are of marginal quality for irrigation and are used mainly for shallow-rooted crops or pasture.
>
> "*Class 5*: Class 5 lands are those lands which have been placed into a deferred status pending further investigation. There were no lands included in a deferred status.
>
> "*Class 6*: Class 6 lands do not meet the minimum requirements for arability under the land classification standards used."

The land classification system was first utilized to determine all arable acres. The arable acreage was then analyzed from an engineering standpoint. The resulting irrigable acres were then subjected to stringent economic analysis, including cropping pattern and crop yield analysis. The economic analysis requirement was satisfied. Wyoming proposed no alternative land classification system. We approve the system adopted by the master, finding it reasonable and fair to the parties.

The master determined that the arable land base was 76,027 acres. Wyoming claims on appeal that the arability investigation did not meet Bureau of Reclamation Standards for 60% of the land as to the depth to barrier, maximum slope, hydraulic conductivity, barrier definition and maximum drain spacing standards. The special master accepted the approach of the United States as meeting its burden of establishing the land base for the determination of arability. There was substantial evidence to support this determination, and looking, as we must, only to the evidence of the United States, we affirm the master's finding of 76,027 acres of arable land base.

2. Engineering Feasibility

The State next attacks the design work of Dr. Woldzion Mesghinna, the United States' irrigation engineer, because he had never before designed a system for Wyoming lands and because none of the systems he had

designed were yet operational. Despite these complaints, Wyoming did not object to his admission as an expert witness. The questions raised go only to the credibility of the witness, not his competence. Credibility is for the trier of fact. State ex. rel. Workers's Compensation Division v. Colvin, Wyo., 681 P.2d 269 (1984); Crompton v. Bruce, Wyo., 669 P.2d 930 (1983); Matter of Altman's Estate, Wyo., 650 P.2d 277 (1982). The master praised Mesghinna's thorough work and found him not only credible, but "detached from any preconceived estimates of what should be the result." The State objected that Dr. Mesghinna's irrigation design contains some non-arable Class 6 lands, perhaps as much as 487 acres. Dr. Mesghinna explained: "In squaring off process, which you cannot escape in any work of this kind, we might have included a very small portion of Class 6 lands, and with the same token, we have omitted large lands which are classified as arable by HKM." Counsel for Wyoming did not contend before the special master that this invalidated the design work, but only that "it's remarkably important, Your Honor, because it will come up with respect to the question of [crop] yields." Wyoming has presented us no cogent argument to support the notion that including irrigation for some fields containing some Class 6 lands invalidates the design work. The climatological data determines water requirements which govern the irrigation system design. Dr. Mesghinna did not use inaccurate climatological data. Dr. Mesghinna testified that he had never received any of the old, inaccurate solar radiation data from the Lander Airport. Instead of relying on measurements of solar radiation, Dr. Mesghinna used four equations to calculate evapor-transportation, relying upon the ratio of actual to possible sunshine. The State had ample opportunity to directly challenge HKM, the United States' agricultural engineer, on the reliability of its work, but apparently chose not to do so. The special master correctly denied Wyoming's motion, made at the close of cross-examina-

tion, to strike Dr. Mesghinna's entire testimony for lack of foundation. The special master, after weighing the testimony, accepted Dr. Mesghinna's climate work and found that it satisfied "any burden of the United States to prove the claimate base for the engineering feasibility analysis. The State does not shift the burden back merely by asserting that greater efforts could have been made in the data collection." Credibility of the witness was for the trier of fact, and the master found the witness credible and his data reliable; we accept that finding.

The master did not abuse his discretion in accepting the engineering feasibility work which incorporated 35% project efficiencies rather than a 50% project efficiency. It is well established in Wyoming that it is appellant's burden to demonstate an abuse of discretion. Canyon View Ranch v. Basin Electric Power Corp., Wyo., 628 P.2d 530 (1981). An abuse of discretion is an error of law under the circumstances; it occurs where the court could not reasonably conclude as it did. Martinez v. State, Wyo., 611 P.2d 831 (1980). A ruling which shocks the conscience of this court is held to be an abuse of discretion. Waldrop v. Weaver, Wyo., 702 P.2d 1291 (1985). See also Walker v. Karpan, Wyo., 726 P.2d 82, 90 (1986).

The master determined that practicably irrigable acreage should be based on present standards. Mr. Floyd Bishop, former State Engineer, gave the following testimony as a water resource engineer for the State: "The overall efficiency, I think can reasonably be expected to be higher than [35%]. I think a close management and husbandry of the water resource will provide a 50% overall efficiency in projects of this kind." The special master rejected Mr. Bishop's testimony because his overall efficiency estimate did not have the components of application, distribution or conveyance efficiency, and properly found the United States' claim for unit and total diversion to be reasonable and supported by the evidence. He explained that Dr. Mesghinna's

> "water duty 'is quite low as compared to what is going out right now' in other areas around the Reservation."

The master, therefore, found:

> "35. The United States claim for unit diversion and total diversion is reasonable and supported by convincing and the better evidence, particularly since Dr. Mesghinna's average water duty is more restrictive than the present historic use in Water Division 3."

Upon the evidence, the master could reasonably accept the position of the United States and did not abuse his discretion in doing so.

The United States' evidence indicates that an adequate water supply is available to serve the future projects. Mr. Ronald Billstein, the United States' water resource planner, explained that any apparent shortages are manageble because available soil moisture or efficiency adjustments compensate for the shortage and thus there is no actual shortage for agriculture. The Wyoming model, on the other hand, which not only includes state-awarded water rights and reservoirs but includes in-stream flow as well as diversionary requirements, shows that two stream reaches would contain only 98% of the total United States claims. The master did not err because he did not award the total diversion request of the United States.

3. Economic Feasibility

The five future projects were reduced by 10% to compensate for potential error in the arable land base and then subjected to economic analysis. After deleting 10% from the acres satisfying the engineering feasibility determination (i.e., before the economic analysis) the special master found the following acreage within the projects feasible to irrigate:

North Crowheart	34,933 acres
South Crowheart	4,238 acres
Arapahoe	3,437 acres
Riverton East	3,442 acres
Big Horn Flats	2,410 acres
	48,520 acres

After economic analysis, the special master awarded reserved water rights for the following practicably (i.e., economically) irrigable acreage:

Project	Acreage	Diversion
North Crowheart	34,993	133,324 af/yr
South Crowheart	4,238	18,181 af/yr
Arapahoe	3,437	15,088 af/yr
Riverton East	3,442	15,837 af/yr
Big Horn Flats	2,410	6,507 af/yr
Total	48,520	188,937 af/yr

It is readly apparent that the master found economically feasible, or practicably irrigable, all the acres he found to be irrigable from an engineering standpoint. Wyoming has cited no evidence in the record indicating that the economic feasibility testimony does not apply to the acres the master found to be practicably irrigable.

The master properly accepted a 4% discount rate in determining economic feasibility. Mr. David Dornbusch, economist for the United States, testified that he used principles recommended by the Water Resources Council, that the correct rate was in the range of 2 to 4%, and that he used 4% in his calculations. He agreed that the better practice is to stay with the original rate even if the discount rate goes up during the project and that the WRC rate on the date he testified was up to 7⅛%. Wyoming would have us decide that there is no lawful basis for using a 4% discount rate instead of the 7⅛%

rate required on federal water projects in 1979. 42 U.S.C. § 1962d-17(a); 44 Fed.Reg. No. 210, October 29, 1979, 18 C.F.R. 70439. Yet the other economists who testified, Dr. Ronald Cummings for the Tribes, Dr. Stephen Goldfeld for the United States in rebuttal and Dr. David Brookshire for the State, did not use 7⅛%. The State's own witness did not rely on the regulatory rate of 7⅛%. Dr. Brookshire testified that a range of rates is more appropriate and said that a range of 4-11% was appropriate here. Dr. Cummings felt 2-4% would be proper. Dr. Goldfeld placed 2½% as the correct rate within his 1-4% range. After weighing the evidence, the master concluded "that the preponderance of the evidence clearly supports the conclusions of Mr. Dornbusch." The master could not accept the State's evidence because Brookshire improperly excluded the household rate and relied on the average, rathr than the marginal, rate. The master did not err in accepting Dornbusch's 4% discount rate.

The United States' crop yield rate was not without a competent foundation. The master criticized the approach of the State and found:

> "The future projects incorporate state of the art technology and improved approaches to irrigation farming not currently used by farmers in the area. Better technology and management makes higher yields reasonably foreseeable, and given evidence of current similar yields already obtained by farmers in the area, I find the preponderance of the evidence clearly supports the projections of the United States."

On cross-examination, Mr. James Jacobs, agricultural economist for the State, admitted that at least one farmer gets malt barley yields ranging from 90 to 115 bushels per acre. Mr. Douglas Agee for the State reported 100 to 115 bushels in the central area near Riverton. This alone would provide adequate support for Dornbusch's 100 bushel projection. In addition, Dornbusch interviewed 20 to 25 farmers and obtained recent averages from them.

He departed from the average 83.3 bushel figure for malt barley in the Agee Report (prepared for the State) because

> "in interviewing the farmers I thought pretty uniformly the progressive farmers who were conscientious about irrigating, fertilizing and using progressive techniques had for the most part entirely, all of them, had yields that were higher than Agee's. The most glaring difference was in malt barley, and for that reason I chose to depart from Mr. Agee's malt barley yield, but stick with his for others."

The crop yield figures were not without foundation.

That Mr. Dornbusch made no reduction in crop yield projections to account for the time necessary to bring the future project areas to full production does not invalidate the crop yield figures. The master correctly observed:

> "[Dornbusch] addressed the issue from the production cost side of the equation, increasing his per acre costs to account for the possibility of lower yields in the initial years of operation. I find this cost method reasonable and an acceptable solution to the matter and, therefore, make no alteration to the crop yield projections of the United States."

The master did not err in accepting Dornbusch's methodology and cost elements derived for on-farm production costs and management and labor costs. Dornbusch testified that his analysis of fixed costs was based upon the most efficient use of the equipment, rather than unit size, because under cooperative Indian management the equipment could be used on larger than normal farms. Doug Agee, for the State, challenged this to some extent: "They can become more efficient up to a limited size, and then that curve starts to back up." The master considered the conflicting testimony and determined that

> "the approach taken by Dornbusch [is the] more realistic, and his assumption of tribal cooperation on

> the projects is not only reasonable, but well supported by the preponderance of the evidence."

Sufficient evidence supports the use of Dornbusch's figures.

The United States' management and labor costs used only 20% of actual costs and assumed that unemployed Indians would supply labor. The disagreement between Dornbusch, for the United States, and Jacobs, for the State, was over what proportion of labor costs have a zero opportunity cost owing to high unemployment on the reservation. Dornbusch's 80% was derived from information from the BIA, interviews, and the historic experience on the reservation. Jacobs, who would cost farm labor at 75-100%, did less thorough work, relying on his own "judgment call." The United States' economist provided adequate foundation for his figures.

The master's determination that the Wind River Indian Reservation embraces practicably irrigable acreage is proper. We therefore affirm the district court's award of a reserved water right for future projects covering practicably irrigable acreage.

4. 10% Reduction

The master erred in reducing the award of a reserved water right by 10% on grounds that

> "[e]rror is probably inevitable whenever a group of people are required to coordinate and analyze such a complex matter [land classification] and must rely on a field of expertise which, by its very nature, lacks the certainty of complete objectivity. But that concern can be addressed by an appropriate percentage reduction in the totals to reflect the unavoidable errors that arise in such a study."

The master specifically found that the United States met its burden of proof in establishing the arable land base. Wyoming, he said, did not present a case sufficient to refute the evidence of the United States, but did raise "some concerns sufficient to support a percentage reduc-

tion." The master settled on a 10-15% reduction as appropriate and credited the United States with the 5% Dr. Mesghinna deducted for farmsteads and roads.

Even assuming there is a 10-15% margin of error in the United States' arable land base, it is clear that a margin of error works both ways. It is as likely the United States claimed 10-15% too few acres as arable as it is that it claimed 10-15% too many. Even counsel for the State referred to "the 10 percent *plus or minus* tolerance for accuracy." (Emphasis added.) The master found the United States had proved the arable land base by a preponderance of the evidence. Wyoming may have planted uncertainties in his mind, but by his own admission, they did not produce a preponderance of evidence to show that any particular acreage was not arable.

No independent evidence supports the reduction. The figures cited to us as evidence in support of the reduction are independent of any margin of error. We have already disposed of the claims that the United States' climatological data was without foundation, that the United States' efficiencies were reduced at trial, that a Wyoming witness said 50% efficiencies were possible, that another witness said only about 30,000 acres were irrigable, holding them insufficient to require a reduction in PIA. We addressed the inclusion of Class 6 lands and the squaring off process and resolved that claim adversely to Wyoming. Although Dr. Mesghinna admitted on cross-examination that his arable land might contain houses, cemeteries, dumps, gravel pits and the like, he also explained he had reduced the claimed arable land base by 5% to account for these. Thus, Wyoming has directed us to no independent evidence supporting the 10% reduction.

The master found (1) that the United States met its burden of proof on the arable land base, (2) that it proved engineering feasibility not only by a preponderance of the evidence, but as the most reasonable conclusion, (3) that it proved the diversion requirements "by convincing and the better evidence," (4) that its

cropping patterns were supported by the evidence and reasonable, (5) that its production costs were supported by the preponderance of the evidence, (6) that its incremental phase-in of the Indian management and normalization factor were supported by the preponderance of the evidence, (7) that it proved its reasonable discount rate by a preponderance of the evidence, and thus (8) that:

> "59. The claimants for a reserved water right have established their asserted case by a 'preponderance of the evidence,' which is the standard of proof clearly appropriate in this matter."

We have affirmed each of these findings. There should not have been a 10% reduction in the reserved water right, and we reverse that part of the decision.

5. Stagner Ridge and Big Horn Flats Extension

In addition to the future project lands the United States claimed as practicably irrigable acreage, the Tribe claimed a reserved water right for two additional projects, Stagner Ridge and Big Horn Flats Extension. It does not appear that these areas were denied a reserved water right because they were nonarable or even not feasibly irrigable from an engineering standpoint, so we will not address those questions. Rather the reserved water right was properly denied because the projects are not economically feasible.

Mr. Jack Keller, the Tribes' agricultural irrigation engineer, reduced the costs for these projects developed by Stetson Engineers for the United States by removing the roof from the pumping plant, but cutting materials costs and by reducing the sprinkler pressures. Keller did not analyze the canal systems and related structures. Lyman Willardson, irrigation and drainage engineer and field investigator for the Tribes, spent an inadequate amount of time in the field. In addition, Stetson Engineers, on whose expertise the master had relied in awarding acreage for the five future projects, chose not to in-

clude these two projects in the United States' claim on the basis of costs. Willardson testified that only by saving on the other five projects by reducing drainage, a practice dangerous to the productivity of the land, would the two extension projects become economical. Mr. Merrill testified for the United States that the bank of 9,000 hp pumps would increase the costs unacceptably for projects of this size. The master correctly concluded that the balance tipped away from the Tribes.

The comparable land approach to PIA rests on the fact that the lands in question are similar to other lands irrigated in the West, and so they, too, must be PIA. The master rejected this approach because Keller's cursory investigation of only one of the proposed project areas did not prove comparability. The comparable costs approach rests on the fact that if the costs are comparable to other projects, the acres are practicably irrigable. The per acre costs presented by the Tribes were well within the State's range for the five future projects. Nonetheless, the figures for the two extension projects were based on the cost-cutting the master rightfully condemned.

Nor does the Stagner Ridge Project meet the stipulated PIA definition. The master found the Tribes' witnesses not credible. Mr. Ronald Bleisner, the Tribes' irrigation engineer, admitted he sometimes followed instructions, not his conscience. Mr. Willardson, the Tribes' irrigation and drainage expert, was not credible because of his hasty investigation. Mr. Cummings' cost figures were incomplete; they did not include off-reservation costs. Stagner Ridge meets the PIA definition, with its cost/benefit ratio of 1.33, only if the cost figures are accepted. The master found them not credible and did not err in excluding Stagner Ridge and Big Horn Flats.

C. *Historic Lands*

The district court awarded a reserved water right for 54,216 practicably irrigable acres currently and/or his-

torically irrigated on the reservation, defining five types of historic lands:

(a) Adjudicated trust lands are lands with an uncancelled state permit or certificate of appropriation;

(b) Unadjudicated but currently irrigated trust lands are those being irrigated at the time of trial, but not carrying a state permit or certificate;

(c) Type VII trust lands are those previously irrigated but currently idle or retired;

(d) Type VIII trust lands are undeveloped arable lands, not currently irrigated but irrigable from existing canals (i.e., within or near project areas); and

(e) Indian fee lands are those owned in fee by individual Indians.

1. Presumptions

The master did not adopt improper presumptions relieving the United States and the Tribes from their burden of proving that the claimed historic acres met the stipulated definition of practicably irrigable acreage.

> "I believe my presumption of irrigability regarding these [historically irrigated] lands was fair and that all parties fairly understood it. Like any other presumption, it asserts that the factual picture is sufficiently strong as to require an opponent's answer."

The master held during the proceedings that an uncancelled state permit was prima facie evidence of irrigability. The district court accepted this holding.

There is no doubt that this presumption rests on reason. Quinlan v. Jones, 27 Wyo. 410, 198 P. 352, 354 (1921). We have no quarrel with the proposition that presumptions are not necessary where the facts are available or known, Porter v. Wilson, Wyo., 357 P.2d 309, 316 (1960); Castor v. Rice, 71 Wyo. 99, 254, P.2d 189, 191 (1953);

Kammerzell v. Anderson, 69 Wyo. 252, 240 P.2d 893, 895 (1952), but note that Wyoming also argues that the award for historic lands is improper because the facts were not known.

In a pretrial hearing the State of Wyoming agreed to the presumption when it argued, on behalf of individual private appropriators, that certificates of appropriation were prima facie evidence of a state water right and that the burden should be on the contestant to disprove a right to water. The state also argued that because it constantly monitors the water to be sure water is being used in accordance with the terms of the certificates, one cannot assume water is being wasted. The superintendent for Water Division No. 3 testified that he knew of no water rights in his division subject to abandonment and that he likely would know if there were. The State thus convinced the master that a certificate or permit is prima facie evidence that water is being put to beneficial use. The special master simply applied this reasoning to Indian lands as well, holding that the burden was on the State to show non-irrigability of Indian lands carrying a permit or certificate. Thereafter, Wyoming did attempt to prove that the claimed adjudicated acreage was not practicably irrigable, and in fact met its burden, convincing the master to delete some 5,017 acres of adjudicated lands. There is no merit to the contention that Wyoming did not fully understand the master's ruling that an uncancelled permit or certificate of appropriation was prima facie evidence of PIA.

The "presumption" concerning other historic lands was not a presumption at all. Rather, the master took evidence on arability, engineering feasibility and economic feasibility and found the United States' evidence to be "competent, generally convincing, and in most cases adequate in supporting Federal claims." As to the Tribes' claims for Indian fee land, the master found the evidence showed the land awarded a reserved water right to be

PIA. The evidence the master accepted was different from evidence used to prove PIA for the future projects but it was sufficient to meet the stipulated definition of PIA.

2. Adjudicated Lands

The United States was awarded a reserved water right for 12,395 of the claimed 17,411 acres of land within the reservation covered by an uncancelled state permit or certificate of adjudication. Sufficient evidence supports the finding that this acreage is economically feasible to irrigate. Mr. George Christopolous, then the State Engineer, testified for the State that a certificate does not represent a determination that the land is capable of sustained irrigation at reasonable cost. The United States performed no economic analysis for the adjudicated acres. Yet this court has defined beneficial use as the limit of water which can be economically used. Nicholas v. Hufford, 21 Wyo. 477, 133 P. 1084, 1087-1088 (1913). We have also indicated that a certificate is prima facie evidence of a water right. Basin Electric Power Coop. v. State Board of Control, Wyo., 578 P.2d 557 (1978); Quinn v. John Witaker Ranch Company, 54 Wyo. 367, 92 P.2d 568, 571-572 (1939); Laramie Irrigation and Power Company v. Grant, 44 Wyo. 392, 13 P.2d 235 (1932); Campbell v. Wyoming Development Company, supra 100 P.2d 124; Hamp v. State 19 Wyo. 377, 118 P. 653, 663 (1911). We have said that a certificate is evidence of current, as opposed to potential future, beneficial use. Green River Development Company v. FMC Corp., Wyo., 660 P.2d 339, 346 (1983). David Dornbusch, economist for the United States, testified that the fact that the land is being irrigated means it is economically feasible to do so. We acknowledge that the beneficial use standard for abandonment of a water right under state law is not identical to the definition of PIA, but emphasize that the fact that a state water right has not been abandoned for failure to beneficially use the water is a

strong indication that the land is being productively irrigated. Thus, the master and the court did not err in awarding a reserved water right for adjudicated lands without formal proof of economic feasibility. Furthermore, once the master correctly ruled that a permit or certificate is prima facie evidence of PIA, it was incumbent on the State to show specifically which areas were not PIA. Wyoming cites us to no evidence showing that any of the adjudicated lands for which an award was made were not economically feasible to irrigate. The court did not err in awarding a reserved water right for lands carrying a valid state water right.

The court nonetheless reduced the United States' claimed reserved water right for adjudicated lands, deleting a total of 5,017.1 acres as follows:

Type IX lands ("out" land types)	845.9 acres
Class 6 lands	2,971.7 acres
Class 6 lands	360.5 acres
Type VII (retired) lands	829.0 acres
Type VIII lands with no economic analysis	10.0 acres

The bases of the reduction were that Wyoming showed 5,007.1 acres to be nonarable by the United States' own standards and that the United States had not proved 10 acres of undeveloped land to be economically feasible to irrigate.

The master did not find the 2,971.7 acres of Class 6 lands to be nonarable only by finding that they could not be economically irrigated. We have already said that any economic analysis is a third step to determine whether arable lands can be economically irrigated; the fact that land can be economically irrigated does not make it arable. The special master adopted the United States' definition of Class 6 lands as "lands which do not meet the minimum standards or requirements for arability under the Land Classification Standards used by HKM, and are nonarable." Mr. Sommers, for the State, agreed

that Class 6 lands are by definition not arable. Language indicating that the master gave Wyoming the benefit of the doubt only indicates he found the State's witnesses credible in identifying 3,817 acres of Type IX and Class 6 lands. The master did not err in excluding these non-arable adjudicated lands.

The master deleted another 360.5 acres of Class 6 adjudicated trust lands. The 244.1 acres of Class 6 land are currently irrigated and thus economically feasible to irrigate. But we have said that the fact the land is economically feasible to irrigate does not make it arable. Thus there is no merit to the contention that the 244.1 acres were improperly excluded. As to the 116.5 acres, the master found the State's evidence that the acres were Type VII, currently idle lands, which were only possibly arable more credible than the HKM soil logs indicating the land is Class 3 or Class 4. The master could not add the 116.5 acres to the Type VII award because the necessary economic analysis had not been performed; therefore, he eliminated them. The court did not err in deleting these acres.

The master excluded 829.0 acres of Type VII land because he thought the United States did not show the land to be PIA with economic analysis. The record reflects that the United States did prove its case regarding these Type VII, not adjudicated, lands with economic analysis. But it is well established that this court will uphold the action of the district court for any proper reason appearing in the record. Anderson v. Bauer, supra 681 P.2d 1316; Mentock v. Mentock, supra 638 P.2d 156. And Mr. Sommers testified for the State that some 837.7 acres of Type VII land were not arable. Thus, the deletion of 829 acres was proper because the land was not arable.

The master and the court did not err in finding that the State rebutted the presumption of PIA for 5,017.1 acres of the 17,411 acres of adjudicated trust lands claimed by the United States.

3. Unadjudicated In-Use Lands

The United States received a reserved water right for 28,129 of the claimed 34,427 acres of unadjudicated, but currently irrigated, trust lands. The master found credible the testimony of Mr. F. T. Kersich of HKM Associates, agricultural engineer for the United States, that the land was arable. He was satisfied that physical and cultural obstacles to irrigation were adequately accounted for. He also accepted the testimony of Mr. Dornbusch, the United States' economist, that current successful irrigation indicates economic feasibility. Thus, there is sufficient evidence that the acres awarded a reserved water right are arable and economically feasible to irrigate.

Nonetheless, the master deleted a total of 6,298 acres. He refused to award a reserved water right for 3,575.9 acres of Class 6 land. The United States' claims that it is unfair to exclude Class 6 lands when such lands are in fact being irrigated in the Midvale and LeClair projects, and that the master "placed an insurmountable burden on the United States—to prove that what is done in fact is not impossible to do in theory," are not well taken. It was the United States which defined Class 6 land as not arable, and it was the United States which classified these 3,575.3 acres as Class 6 lands. Thus the United States has essentially admitted that these acres are not practicably irrigable and not entitled to a reserved water right. The court did not err in excluding these acres.

The master also deleted 879 acres for which the United States' soil logs contain notations "which discredit this irrigability." Mr. Sommers' testimony for the State pointed out that these notes question the arability of these acres. The master found this testimony credible and refused to strike it. The comments were: "doesn't appear to have been farmed"; "seeped • • • too expensive to drain"; "subject to flooding"; "many cobbles and bould-

ers on surface"; "poor land; water table is high"; "subirrigated"; "alkali on surface • • • subject to floods"; and "probably not used for irrigation." It is clear that this testimony and evidence support the deletion.

The court deleted 246 acres of subirrigated land. The master's deletion of 1,778 acres of subirrigated land was reduced by stipulation of the parties to a deletion of 246 acres in the Johnson Decree. The United States' own expert witness, Mr. Billstein, admitted that subirrigated land is nonarable. The court did not err in excluding these acres.

The master also deducted another 55.6 acres of Type VII, retired, lands. The land is not currently in use and because no economic analysis was done on it, it could not be included in the Type VII award. Mr. Sommers, testifying for the State that the acreage was idle, may have relied upon the wrong HKM log. Wyo. Exh. WRIR SS-1001 does identify tract 35-1 (55.6 acres) as Type IV, Class 4 land, but it also notes that the tract is "idle hayland." The United States does not indicate where the proper soil log is to be found in the record nor that Mr. Sommers was questioned about his use of an improper soil log at trial. Without some indication that this claim has merit, we will not consider it further.

The Tribes' argument that once actual irrigation is shown, the land should be considered to be PIA unless the use of water is demonstrated to be wasteful is not well taken. The State's showing that some of the claimed lands are not currently irrigated takes those acres out of the proposed rule. The finding that the remaining deleted acres are not arable means that they cannot meet the definition of PIA.

The master did not err in deleting 6,298 acres of the claimed 34,427 PIA, unadjudicated in-use trust lands.

4. Type VII Lands

The United States was awarded a reserved water right for 6,271 of the claimed 7,946 acres of Type VII, previously irrigated but currently idle, or retired, land. The master excluded 1,546 acres of Class 4 and Class 6 lands as "simply too marginal to be awarded a finding of practicable irrigable acreage." We have already said that Class 6 lands are not arable and must be excluded. Class 4 lands are "[l]ands of marginal quality for irrigation, suitable mainly for shallow rooted crops or pasture." The excluded acres were not classified as Class 6 for both gravity and sprinkler irrigation. Nonetheless, Mr. David Dornbusch, economist for the United States, eliminated even some Class 4 gravity—Class 4 sprinkler acres as economically unfeasible. Mr. Sommers testified for the State that additional acreage should be deleted because the United States relaxed its arability standards for these historic lands. Mr. Ross Waples, a United States land classifier and soil scientist, testified that the lands were properly designated Class 4 sprinkler only when "the conditions that would be required to make it arable are met, which are drainage and the [soil] amendments." The land conditions not being met, the master and the court were justified in deleting this Class 4 acreage as just too marginal.

The master also deleted 129.5 acres because they did not meet the United States' minimum size standards. Mr. Waples explained that the size of the parcel "is irrelevant if it can be operated as part of a larger field" and admitted that the size standards were not strictly followed. The difficulty with this practice is that, even when the small parcels were joined with other parcels for management purposes, they either did not meet the 40 acre parcel requirement or were separated by a fenced paved county road. The master did not err in eliminating these parcels.

5. Indian Fee Land

The Tribes claimed a reserved water right for a total of 10,374 acres of Indian fee lands—land on the reservation owned in fee by individual Indians—and proved that 6,155 acres were entitled to reserved water rights. The Tribes admit that the omitted 3,943 acres are not currently irrigated, and the testimony that Indian fee land was comparable to other reservation lands dealt only with irrigated lands. Thus there is no evidence to support inclusion of these non-irrigated lands even under the Tribes' comparable lands test for PIA.

The master did not accept these acres under the stipulated PIA definition because no economic analysis was performed. Keith Higginson, the Tribes' water resources engineer, testified that he believed the economic analysis was not necessary. The master implicitly agreed with him for the currently irrigated acres, but required the economic analysis for non-irrigated acres. The master did not rule that a formal benefit/cost analysis was necessary, only that some economic analysis was required. Yet Mr. Higginson merely assumed economic feasibility because "it was simply, in most cases, a matter of extending the ditch or a lateral in order to bring the water to the land." He did not opine as to the cost of such activities, nor show the relationship of the tracts to existing diversion works.

The master also disallowed 276 acres of Class 6 and subirrigated Indian fee land. For the reasons outlined supra, he did not err.

6. Efficiency Increase

In an irrigation system, the more efficient the use of water, the less water is needed. A system operating at 25% efficiency uses twice as much water as a system operating at 50%. In a 100% efficient system, the plants would use every drop of diverted water. The current average efficiencies for both project and non-project lands

is 35%; a 50% overall efficiency is probably achievable. The district court quantified the reserved water right for historic lands based on a 40% efficiency.

Sufficient evidence supports the increase. Mr. Bishop for the State testified that a 50% overall efficiency was achievable. Mr. Higginson for the Tribes testified 40% was possible with the use of hand-moved sprinklers. Mr. Thomas Stetson, water duty engineer for the United States, said better efficiency could be achieved without a large cost investment but with better management. Thus there is evidence to support the master's finding that a 5% increase in efficiency is acceptable.

The award does not interfere with the Tribes' right to administer their own affairs; it merely quantifies the reserved right for historic lands by awarding only the amount of water necessary to irrigate all the PIA. The master did not discriminate against the Indians; he had no power to order an efficiency increase for non-Indian users in Water Division No. 3. The Tribes will not lose 12½% of their reserved water right if they do not expend whatever funds or efforts are necessary to achieve a 40% efficiency; the amount of water awarded them was reduced under sound principles. It matters not that expensive modifications may be necessary in order that the Tribes can fully utilize the water awarded on all the historic PIA; expensive construction is necessary to irrigate the future PIA for which the Tribes have accepted water.

The court did not err in reducing the reserved water right for historic lands to the amount necessary to irrigate all the PIA based on an overall efficiency of 40%.

D. Sensitivity Doctrine

The sensitivity doctrine takes its name from this passage:

> "I agree with the court that the implied-reservation doctrine should be applied with sensitivity to its im-

pact upon those who have obtained water rights under state law and to Congress' general policy of deference to state water law." United States v. New Mexico, supra 438 U.S. at 718, 98 S.Ct. at 3023 (Powell, J., dissenting in part).

The majority in that case said:

"The quantification of reserved water rights for the national forests is of critical importance to the West, where, as noted earlier, water is scarce and where more than 50% of the available water either originates in or flows through national forests. When, as in the case of the Rio Mimbres, a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators. This reality has not escaped the attention of Congress and must be weighed in determining what, if any, water Congress reserved for use in the national forests." *id.*, 438 U.S. at 705, 98 S.Ct at 3016-3017.

The Court indicated that water is reserved only to fulfill the purposes of the reservation, id., 438 U.S. at 700, 98 S.Ct. at 3014, and that a careful examination of the purposes and the amount of water claimed is essential. Id., 438 U.S. at 700-702, 98 S.Ct. at 3014-3015. Yet in Arizona v. California, supra 460 U.S. at 625, 103 S.Ct. at 1395, the Court refused to reconsider the PIA standard in light of the holdings in New Mexico, supra, and in Washington v. Washington State Commercial Passenger Fishing Vessel Association, supra 443 U.S. 658, 99 S.Ct. 3055 (dealing with a right to take fish, not Indian reserved water rights). There is strong indication that New Mexico does not apply to Indian reserved water rights. F. Cohen, Handbook of Federal Indian Law 581-585 (1982 ed.). The ninth circuit has nonetheless gleaned useful guidelines from it for use in Indian reserved water cases. United States v. Adair, supra 723 F.2d at 1408. It is thus not clear whether the sensitivity

doctrine, requiring the quantification of reserved water rights with sensitivity to the impact on state and private appropriators, applies here.

Assuming, arguendo, that it does apply, we cannot accept the City of Riverton's argument that it was ignored by the district court. Neither the provision in the Amended Judgment and Decree eliminating the upstream storage requirement from the future projects award nor the award of the reserved water rights in acre-feet per year rather than cubic feet per second violate the sensitivity doctrine.

Deletion of the upstream storage requirement which was intended to protect appropriators from sudden depletion by the diversion of water for the five future projects does not manifest insensitivity to other water users. The doctrine of reserved water rights entitles the Indians to a certain quantity of water. The requirement that they must first construct storage facilities to supply their entitlement flies in the face of the object of the reserved water right—a prior entitlement to the waters. There is no indication that elimination of the storage requirement before diversion of future project waters will require a gallon for gallon reduction in the water available for other users.

The award of a reserved water right in acre-feet per year is an accepted means of award. Arizona v. California, 376 U.S. 340, 342-345, 84 S.Ct. 755, 756-758, 11 L.Ed.2d 757 (1964); Mimbres Valley Irrigation Company v. Salopek, 90 N.M. 410, 564 P.2d 615 (1977), aff'd sub nom. United States v. New Mexico, supra 438 U.S. 696, 98 S.Ct. 3012. The City has cited us no authority for the proposition that the mere form of an award of reserved water can violate the sensitivity doctrine.

Nor does this court's elimination of the 10% diversion reduction for future projects violate the sensitivity doctrine. The sensitivity doctrine does not preclude the award of a fair reserved water right.

In the case at bar, the purpose of the reservation for which water is reserved is narrow—agricultural only. The right was quantified based on PIA—the master and the court rejecting some 50,000 acres originally claimed by the United States and the Tribes. The Indians' claim was further reduced by requiring an efficiency increase in historic lands. All of this evidences a sufficient sensitivity to the water needs of other water users.

With the exceptions noted above, we affirm the quantification of the reserved water right.

VII

PRIORITY DATES

A. *Diminished Reservation*

We recognized earlier in this opinion that there was indeed a federal water right impliedly reserved for the Indians when the Wind River Indian Reservation was created by the 1968 Treaty. Therefore, we affirm the rulings below that the tribal diminished-reservation lands have a water right with a priority date of 1868.

B. *Indian Fee Lands*

The special master held that land within the reservation held in fee by individual Indians which never left Indian ownership held a priority date of 1868. In United States v. Powers, supra 305 U.S. at 533, 59 S.Ct. 344, the Court said it found nothing to show that Congress intended allottees be denied participation in the use of reserved water rights. See also Colville Confederated Tribes v. Walton, supra 647 F.2d 42; United States ex rel. Ray v. Hibner, supra 27 F.2d at 912. We affirm.

C. *Allottees' Grantees*

For many years the courts have struggled to define the water rights of those who succeed to the lands of Indians.

United States ex rel. Ray v. Hibner, supra 27 F.2d at 912. In Skeem v. United States, supra 273 F. 93, the court had held that Indian allottees were entitled to a reserved water right with a treaty priority date. The recognized rights of the successors were somewhat different from the rights of the allottee. The non-Indian successor

> "would, as grantee of the Indian allotments, be entitled to a water right for the actual acreage that was under irrigation at the time title passed from the Indians, and such increased acreage as he might with reasonable diligence place under irrigation, which would give him, under the doctrine of relation, the same priority as owned by the Indians." United States ex rel. Ray v. Hibner, supra 27 F.2d at 912.

United States v. Parkins, supra 18 F.2d 642, does not address any claim of right to divert water by virtue of succession to a reserved water right. In United States v. Powers, supra 305 U.S. 527, 59 S.Ct. 344, the Court refused to consider the successors' claim to a reserved water right, id., 305 U.S. at 533, 59 S.Ct. at 346-347, but did note that "[t]he respondents' claim to the extent stated is well founded." Id. 305 U.S. at 532, 59 S.Ct. at 346. In Colville Confederated Tribes v. Walton, supra 647 F.2d at 50, the court reiterated that Indian allottees have a reserved water right and relied upon United States v. Ahtanum Irrigation District, 236 F.2d 321, 342 (9th Cir. 1956), for the proposition that "non-Indian purchasers of allotted lands are entitled to 'participate ratably' with Indian allottees in the use of reserved water." The court defined the non-Indian successor's interest in three ways: The successor cannot acquire a reserved water right for more PIA than the Indian owned; the successor's water right carries a treaty priority date; the successor's right is to the quantity of water being put to use by the Indian at the time title passes and to the water he puts to use with reasonable diligence there-

after. Colville Confederated Tribes v. Walton, supra 647 F.2d at 51. See also id., appeal after remand, 752 F.2d 397, 401-402 (9th Cir. 1985). The court also held that the state permits Walton held were "of no force and effect," because the State had no authority over water on the reservation. In a footnote to the opinion, the court begged the United States Supreme Court to review the case so that "guidance and stability" might be given the issue of allottees' successors rights, "an area of great unrest and uncertainty in Western water and land law." Colville Confederated Tribes v. Walton, supra, 647 F.2d at 54 n.18. Yet the Court has twice denied certiorari. 454 U.S. 1092, 102 S.Ct. 657, 70 L.Ed.2d 630 (1981); 475 U.S. 1010, 106 S.Ct 1183, 89 L.Ed.2d 300 (1986). In United States v. Adair, supra 723 F.2d 1394, the court reiterated that a non-Indian purchaser may succeed to the full quantity of water available to the allottee, id. at 1417, and held that the United States, as a non-Indian successor, also succeeded to the same appurtenant water rights. Id. at 1419.

In United States v. McIntire, 101 F.2d 650 (9th Cir. 1939), the court held that the state water rights procured by the Indian predecessor conferred no valid water right. Likewise, Colville Confederated Tribes v. Walton, supra 647 F.2d at 51, held that the state permits issued for lands carrying a reserved water right were "of no force and effect." We hold that the mere fact that state permits have been issued does not deprive these allottees' successors of a reserved water right with a treaty date priority.

Merrill v. Bishop, supra 287 P.2d 620, was a suit by allottees' successors to enjoin the state engineer from interfering with their headgates. Id. at 620. The actual holding in the case was that the injunction must be denied because the successors had not proved the facts necessary to allow the courts to tailor an injunction. Id. at 626. It is thus apparent that the master relied only on dicta in Merrill v. Bishop. The holding of that case

is narrow and does not prevent relitigating what was not necessary to the decision. Rialto Theatre, Inc. v. Commonwealth Theatres, Inc., Wyo., 714 P.2d 328 (1986); CLS v. CLJ, Wyo., 693 P.2d 774 (1985). We have already decided that the admission of Wyoming to the Union did not abrogate reserved water rights for the reservation. To the extent that Merrill v. Bishop indicates otherwise, it is overruled. Merrill v. Bishop is not res judicata of Webber, Jones and Graboski's claim to a treaty priority date. We have also held that state permits issued for water which has been reserved are invalid. Thus, the administrative proceedings are not res judicata.

On remand, appellants must be awarded a reserved water right with an 1868 priority date for the PIA they can show were irrigated by their Indian predecessors or put under irrigation within a reasonable time thereafter.

D. *Reacquired Lands*

We have already held that a non-Indian purchaser from an Indian allottee obtains a reserved water right with a treaty priority date, and that his non-Indian successor would likewise succeed to the treaty priority date. There is no reason then to deny the same priority to an Indian or tribal purchaser. Because all the reacquired lands on the ceded portion of the reservation are reservation lands, the same as lands on the diminished portion, the same reserved water rights apply. Thus, reacquired lands on both portions of the reservation are entitled to an 1868 priority date.

VIII

MONITORING OF THE DECREE BY THE STATE ENGINEER

The issue of whether the state engineer may monitor the decree is a controversy conferring jurisdiction upon this court. A letter from Wyoming to Judge Johnson which referred to "[t]he federal government's residual

dissatisfaction with Judge Joffee's ruling that the State Engineer shall have primary regulatory responsibility" indicates previous disputes as to the propriety of the ruling. Section 4 of the United States' response confirms the contested nature of the issue. Sufficient adversary character exists to permit a ruling on this question. Brimmer v. Thomson, Wyo., 521 P.2d 574, 577 (1974).

The decree does not violate state law. The provision in the Amended Judgment and Decree does not purport to give full ownership of the reserved water to the State. Thus the argument that the decree divests the Tribes of their water in violation of Article 1, § 32 (eminent domain) of the Wyoming Constitution is inapposite because monitoring by the state engineer is not a taking of property. Article 8, § 1 of the Wyoming Constitution provides that the water is the property of the state and Article 8, § 5 provides that the state engineer has general supervision of the waters of the state. Because Congress, in admitting Wyoming to the Union, 26 Stats. 222, ch. 664, ratified the Wyoming Constitution, it clearly contemplated that whatever superior rights it might temporarily or permanently hold in the waters of this state, the underlying ownership and control would remain with the State. Thus the decree does not violate Article 21, § 1 (rights to continue after statehood) nor does the decree run afoul of Article 21, § 26, which disclaims all right and title to lands owned by Indians until title is extinguished by the United States and provides that Indian lands remain under the absolute control and jurisdiction of Congress, emphasizing that Indian rights remain only so long as the reservation exists. Our Declaratory Judgments Act, permiting the court to enter all necessary orders, § 1-37-106, W.S. 1977, is to be liberally construed to give effect to its remedial purposes and relief from uncertainty. Section 1-37-114, W.S. 1977; Brimmer v. Thomson, supra 521 P.2d at 577. Neither the United States nor the Tribes have advanced other au-

thority for the proposition that the provision violates state law.

Federal law has not preempted state oversight of reserved water rights. In Arizona v. San Carlos Apache Tribe of Arizona, supra 463 U.S. 545, 103 S.Ct. 3201, the Court merely reiterated that Indian water rights in state adjudications must be judged by federal law. In Cappaert v. United States, supra 426 U.S. at 145, 96 S.Ct. at 2073, the Court said: "Federal water rights are not dependent upon state law or state procedures and they need not be adjudicated only in state courts." The procedures referred to are state procedures for perfecting state water rights, not monitoring of already decreed federal water rights. See Colville Confederate Tribes v. Walton, supra 752 F.2d at 400 (federal law governs only scope and volume of reserved right). United States v. Rio Grande Dam and Irrigation Company, 174 U.S. 690, 19 S.Ct. 770, 43 L.Ed. 1136 (1899) dealt only with interference with a navigable stream, and United States v. McIntire, supra 101 F.2d at 654, held a state appropriation of reserved water to be invalid. In Colville Confederated Tribes v. Walton, supra 647 F.2d 42, the court indicated that state administration of the No Name System was inappropriate because the system was entirely within the reservation, but conceded that state regulation may be appropriate in some circumstances. Id. at 52-53. The ninth circuit later conceded that the State could assume some regulatory authority on the reservation. United States v. Anderson, 736 F.2d 1358, 1365 (9th Cir. 1984). See also Federal Youth Center v. District Court in and for the County of Jefferson, 195 Colo. 55, 575 P.2d 395, 400 (1978) (Congress intended to defer to state administration); United States v. City and County of Denver, Colo., 656 P.2d 1, 35 (1982) (U.S. agrees adjudicated federal reserved water rights subject to administration by state engineer); United States v. Bell, Colo., 724 P.2d 631, 644 (1986) (U.S. must submit to state administration). The decree entered in the instant

case does not require application of state water law to the Indian reservation. The decree recognizes reserved water rights based on federal law. The role of the state engineer is thus not to apply state law, but to enforce the reserved rights as decreed under principles of federal law. This court is also cognizant of the fact that exercise of the reserved water rights are intimately bound up with the state water rights of off-reservation users. The state water appropriators are not in a position to jeopardize the decreed rights of the Tribes. The decree only requires the United States and the Tribes first to turn to the state engineer to exercise his authority over the state users to protect their reserved water rights before they seek court assistance to enforce their rights; it does not preclude access to the courts. Incidental monitoring of Indian use to this end has carelessly been termed "administration" of Indian water by the state engineer. Should the state engineer find that it is the Tribes who are violating the decree, it is clear that he must then turn to the courts for enforcement of the decree against the United States and the Tribes and that he cannot simply close the headgates. United States v. Hampleman, supra No. 753, June 26, 1916. Any fear that the state engineer may be unfair must be dispelled by Article 1, § 31 of the Wyoming Constitution which provides that the State "shall equally guard all of the various [water] interests involved." The state engineer has sworn to uphold this constitution. Thus it is readily apparent that the provisions authorizing the state engineer to monitor reserved water rights contemplate neither the application of state law nor the authority to deprive the Tribes of water without the assistance of the courts in a suit for the administration of the decree.

The argument that the instant decree can be administered only by the court in a separate suit for administration under the McCarran Amendment must fail in light of the admission that an independent water master might properly be appointed at this time to administer

the decree and in light of the state engineer's limited authority. The Treaty of 1868 prohibits only unauthorized persons from entering the reservation, but the state engineer would be an authorized person upon his appointment to monitor the decree and could properly enter the reservation.

The district court did not err in including provisions giving the state engineer authority to enforce the decree against state appropriators.

IX

EXPENSES OF THE SPECIAL MASTER

The partial interlocutory decree settling the non-Indian federal reserved rights was final, under Rule 54(b), W.R.C.P., only as to Phase II, non-Indian federal reserved water rights. Nor could an appeal have been taken from the original orders to pay. The United States' timely notice of appeal from the May 24, 1985 Amended Judgment and Decree is sufficient to challenge all aspects of the Phase I proceedings, and we address the merits of the issue.

The McCarran Amendment prohibits taxing of costs against the United States: "[N]o judgment for costs shall be entered against the United States in any such suit [for the adjudication or administration of water rights]." 443 U.S.C. § 666. Rule 54(d), F.R.C.P., provides that "costs against the United States • • • shall be imposed only to the extent permitted by law." Likewise, Rule 54(d), W.R.C.P., provides that "costs against the state of Wyoming • • • shall be imposed only to the extent permitted by law." Both the federal and state rules provide that "compensation to be allowed the master shall be fixed by the court, and may be charged against such of the parties • • • as the court may direct." Rule 53(a), W.R.C.P.; Rule 53(a), F.R.C.P.

A number of federal cases have indicated that costs include the special master's fees and expenses. Norris v. Green, 317 F.Supp. 100 (N.D.Ala. 1965); K-2 Ski Co. v. Head Ski Co., Inc., 506 F.2d 471 (9th Cir. 1974); Capra, Inc. v. Ward Foods, Inc., supra 567 F.2d 1316 (5th Cir. 1978), overruled on other grounds Cooper Liquor, Inc. v. Adolph Coors Co., 701 F.2d 542 (5th Cir. 1983). It is apparent, however, that the reason for this practice is to give the district court discretion as to whether to charge the losing party the entire master's bill. Capra, Inc. v. Ward Foods, Inc., supra, 567 F.2d at 1323-1324; Gary W. v. Louisiana, 601 F.2d 240 (5th Cir. 1979). Costs are generally considered to be the expenses incurred by the litigant, not the court system. 6 Moore's Federal Practice, ¶54.70 at 54-317 (1986). See also Rule 39(e), F.R.A.P. (including as taxable costs the preparation and transmission of the record and necessary transcripts, filing fees, and premiums paid for appeal bonds); Black's Law Dictionary at 312 (5th ed. 1979) ("Fees and charges required by law to be paid to the courts or their officers, the amount of which is fixed by statute or court rule; e.g., filing and service fees"). Therefore, assessing master's fees does not run afoul of the McCarran Amendment.

The United States was not the subject of discrimination because it was the only party other than Wyoming which was required to bear the expenses and fees of the master. Even in original proceedings before the United States Supreme Court, the practice is to allocate the master's compensation among the states and the United States. Arizona v. California, 351 U.S. 977, 76 S.Ct. 1042, 100 L.Ed.2d 1493 (1956).

In the case at bar, the United States insisted upon the appointment of a special master, arguing that the Board of Control could not be objective. Even though objection was groundless, the court appointed a master in order to insure the procedural integrity of the judgment. It was

not unreasonable to require the United States to pay one-half of the master's fees and expenses under such circumstances. In Equal Employment Opportunity Commission v. International Union of Elec., Radio and Mach. Workers, AFL CIO, CLC, Local 758, 631 F.2d 81 (6th Cir.), cert. denied 449 U.S. 1010, 101 S.Ct. 565, 66 L.Ed.2d 468 (1980), the court affirmed the district court's order for the union to pay one-third of the master's expenses because the union had filed no objection to the appointment of the master and because the union had taken an active part in the litigation. In Gary W. v. Louisiana, supra 601 F.2d at 242-244, the court affirmed the order for the State to pay all the master's fees, despite its objection to the appointment of the master, because its failure to comply with the original injunction necessitated the appointment of the master to monitor implementation of the injunction. Where the reference to the master was at the defendant's request and over the plaintiff's objection, and where, as here, the party requesting the reference made no convincing showing that any serious prejudice would result if the reference were denied, it was proper to charge the defendant at least half of the expense of the reference. Johnson Fare Box Company v. National Rejectors, Inc., 269 F.2d 348 (8th Cir. 1959). See also 9 C. Wright & A. Miller, Federal Practice & Procedure, § 2608 at 798 ("If a reference was unnecessary it is quite common to make the party who induced the court to order a reference bear the expense of the reference"). No provision for the payment of fees was attached at the foot of the original reference to the Board of Control simply because there is no authority for assessing the fees and expenses of the Board.

The district court did not err in requiring the United States to pay one-half of the special master's fees and expenses.

X

CONCLUSION

The Amended Judgment and Decree is affirmed in part, reversed in part, and remanded to the district court for further proceedings consistent with this opinion.

THOMAS, Justice, dissenting with whom HANSCUM, District Judge, joins.

I differ from the majority with respect to three propositions and must dissent from the disposition made in the majority opinion. Except for my three points of difference, I am in accord with the resolution of this case as set forth in that opinion. My three points of difference are: first, I do not agree that reserved water rights, to the extent that they properly are recognized under the reserved rights doctrine, should be limited in the manner suggested by the majority opinion; second, I believe that there should be a pragmatic limitation on the standard for quantification, the practicably irrigable acreage, which would eliminate those lands from the quantification formula which only could be irrigated by the construction of some future water project; and third, but most important, I do not believe that the reserved rights doctrine is applicable to that portion of the lands lying north of the "Big Wind River," (i.e., the ceded portion of the Wind River Indian Reservation.

The purpose of establishing an Indian reservation, such as the Wind River Indian Reservation, is to provide a homeland for Indian peoples. If one is to assume that, pursuant to the reserved rights doctrine relating to water, there is an implied reservation of those waters essential to accomplish the purpose of the reservation of land, then I cannot agree that the implied reservation of water with respect to the Wind River Indian Reservation should be limited, as the majority has held in approving the judgment of the district court. The fault that I find with such a limitation is that it assumes that the Indian peoples will not enjoy the same style of evolution as other people, nor are they to have the benefits of modern civilization. I would understand that the homeland concept assumes that the homeland will not be a static place frozen in an instant of time but that the homeland will evolve and will be used in different ways as the Indian

society develops. For that reason, I would hold that the implied reservation of water rights attaching to an Indian reservation assumes any use that is appropriate to the Indian homeland as it progresses and develops. The one thing that I would not assume is that using the reserved water as a salable commodity was contemplated in connection with the implied reservation of the water. I would limit its use to the territorial boundaries of the reservation.

Deeming it unnecessary to detail further the formula for allocation of water which involves the concept of practicably irrigable acreage (Arizona v. California, 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983)) I am convinced that there has to be some degree of pragmatism in determining practicably irrigable acreage. It is clear from the majority opinion that there was included in quantifying the water reserved to the Indian peoples lands not now irrigable but deemed to be practicably irrigable acreage upon the assumption of the development of future irrigation projects. I would be appalled, as most other concerned citizens should be, if the Congress of the United States, or any other governmental body, began expending money to develop water projects for irrigating these Wyoming lands when far more fertile lands in the midwestern states now are being removed from production due to poor market conditions. I am convinced that, because of this pragmatic concern, those lands which were included as practicably irrigable acreage, based upon the assumption of the construction of a future irrigation project, should not be included for the purpose of quantification of the Indian peoples' water rights. They may be irrigable academically, but not as a matter of practicality, and I would require their exclusion from any quantification. For my purposes, this may be a moot point because I believe that hardly any of these lands are situated in the diminished portion of the Wind River Indian Reservation, the only lands to which reserved water rights can be attached.

My third concern is the error which has been committed in including lands north of the "Big Wind River" in the practicably irrigable acreage utilized for determining the quantification of the reserved water rights of the Indian peoples. In my judgment, the majority has ignored the significance of precedent from this court, to which we should accord priority; has failed to recognize the specific treaty history attaching to the Wind River Indian Reservation; and has failed to perceive the rationale of federal authorities addressing the disestablishment of Indian reservations. I would hold that the ceded lands have not been a part of an Indian reservation since 1905; and, since the reserved rights doctrine relating to an implied reservation of water rights depends upon the existence of reserved federal lands, there are no reserved water rights which attach to the ceded portion of the Wind River Indian Reservation. The United States Congress declared that the Indian peoples did not need these lands for the purpose of furnishing them a homeland; and, if that purpose is not present, there cannot be any implied reservation of water.

Turning first to the precedent of our court because of the doctrine of stare decisis, on several occasions, we have addressed the implications of the Act of March 3, 1905, 33 Stat. 1016 (hereinafter Act of March 3, 1905), which approved the Second McLaughlin Agreement, negotiated with the Wind River Indian Reservation Shoshone and Arapahoe Tribes. Our decisions uniformly demonstrate recognition of state jurisdiction over the lands of the ceded portion of the Wind River Indian Reservation." In some instances, we relied upon the concept of "Indian country." In this extraordinarily complex area of law, it seems important to promote rationality, if possible, and I would espouse a rule that for all practical purposes an "Indian homeland" and "Indian country" are one and the same.

In Merrill v. Bishop, 74 Wyo. 298, 287 P.2d 620 (1955), this court held that water rights appurtenant to

lands situated in the ceded portion of the reservation could be perfected only by compliance with the statutory requirements of the State, thus unequivocally asserting jurisdiction over the management of water on the ceded portion of the reservation. The court expressed some doubt as to whether the reserved rights doctrine as to implied water rights, articulated in Winters v. United States, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), pertained to the Wind River Indian Reservation, in light of Art. 8, § 1 of the Constitution of the State of Wyoming, which declares all water within the boundaries of the State to be the property of the State, and the adoption of that constitutional provision by the United States Congress in the Act of Admission, Act of July 10, 1890, 26 Stat. 222. The decision, however, was not premised on such broad grounds. The court said:

> "* * * And so we do not pass upon the right of the United States or the Indians in so far as it concerns water and lands that still remain within an Indian reservation. The federal government being in absolute control thereof and having complete jurisdiction there, the federal courts may hold that the water rights were impliedly reserved notwithstanding the broad language contained in the act of admission of Wyoming. * * * The lands involved in this action became a part of the public domain when Congress on March 3, 1905, approved the treaty of 1904. Furthermore, there is no evidence in the case that any of the Indian allotments here in question were granted prior to that time. So it is not necessary to consider what the law would be if these allotments had been granted while the lands herein involved were still contained in an Indian Reservation. It would seem then that the power to grant allotments after March 3, 1905, remained pursuant to that treaty, but only just as a power existed to acquire a homestead in that area, each with the qualification that water rights could be acquired only by

> appropriation thereof with a priority according to the time of the appropriation. If that were not so then if it should happen that there are still lands within the ceded area of 1904 that might now be allotted to Indians, he or they would then have a water right superior to all the rights acquired by appropriation during the last 75 years. To do so hold would, we think, go beyond the mere protection of the weak against the strong. While Indian rights are to be regarded favorably, that should be done within reasonable limits. That the Indian allottees herein were not ignorant of the laws of appropriation of water is clearly demonstrated by the evidence in this case." Merrill v. Bishop, supra, 287 P.2d at 625.

The question in Blackburn v. State, Wyo., 357 P.2d 174, reh. denied 357 P.2d 1111 (1960), was criminal jurisdiction within the lands ceded pursuant to the Act of March 3, 1905. The argument was made that those lands were "Indian country," and thus, the State of Wyoming had no criminal jurisdiction. The distinctive feature in Blackburn v. State, supra, was that the area in issue was located on the Riverton Irrigation Project, and compensation was authorized for those specific lands by the Act of August 15, 1953, 67 Stat. 592. Congress there provided for the sum of $1,009,500 to be credited and expended for the benefit of the Shoshone and Arapahoe Indians of the Wind River Indian Reservation:

> "* * * [T]o constitute full, complete, and final compensation, except as provided in section 5 of this Act, for terminating and extinguishing all of the right, title, estate, and interest, including minerals, gas and oil, of said Indian tribes and their members of, in and to the lands, interests in lands, and any and all past and future damages arising out of the cession to the United States, pursuant to the Act of March 3, 1905 (33 Stat. 1016) of that part of the

former Wind River Indian Reservation lying within the following described boundaries: * * *."

In Blackburn v. State, supra, this court noted that the Act of August 15, 1953, 67 Stat. 592, was amended by the Act of August 27, 1958, 72 Stat. 935, which provided, in pertinent part:

"* * * [A]ll of the right, title, and interest of the United States in all minerals, including oil and gas, the Indian title, to which was extinguished by the Act of August 15, 1953 * * * is hereby declared to be held by the United States in trust for the Shoshone and Arapahoe Tribes * * *."

We held that any retained mineral interest for the Indian peoples, held in trust by the United States, did not suffice to make the lands "Indian country" as that term is used in 18 U.S.C.A., §§ 1151-1153. This court ruled that, despite a retained interest in mineral proceeds, Congress had extinguished Indian title to the ceded lands.

"* * * Construing the Acts of Congress together, we think, as the trial court held, that the title of the Indians to the lands in the territory here involved has been extinguissed and that the only right reserved to the Indians is in the money or proceeds received by the United States from the sale or lease of any rights in the land." Blackburn v. State, supra, 357 P.2d at 179.

While this court did rely, in part, on the effect of congressional acts, other than the Act of March 3, 1905, in deciding Blackburn v. State, supra, it is clear that the same decision would have been reached relying solely on that Act. We quoted from Application of De Marrias, 77 S.D. 294, 91 N.W.2d 480, 482-483 (1958), as follows:

"'* * * It is provided in the Act of Congress ratifying the agreement of 1889: "That the lands by said

agreement ceded, sold relinquished, and conveyed to the United States shall immediately, * * * be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, *and be subject to the laws of the State wherein located*: * * *." Section 30, Chapter 543, 1891 (26 United States Statutes at Large, p. 1039).

* * *

"'It is readily apparent therefrom that the City of Sisseton is not situated on "land within the limits of any reservation." Consequently it is not within the purview of the term "Indian country" as defined and used in Section 1151, 1152, and 1153 of Title 18 U.S.C.A.'

"The foregoing italicized words are not contained in the Congressional Act of March 3, 1905, but we think that the intent is not different. See also Tooisgah v. United States, 10th Cir., 186 F.2d 93 [1950]. The instant contentions of appellants are overruled." Blackburn v. State, supra, 357 P.2d at 179-180. (Emphasis in original.)

A very similar jurisdictional question arose in State v. Moss, Wyo., 471 P.2d 333 (1970). The situs of the crime in that case was on property within the town of Riverton, Wyoming, which is situated on a portion of the lands ceded under the Act of March 3, 1905, and the court consistently held that Wyoming had jurisdiction over such lands which had not been returned to tribal ownership. The district court had dismissed a criminal information charging Moss, ruling that the State of Wyoming lacked jurisdiction over an Indian person in the town of Riverton. The State brought a bill of exceptions which this court sustained, holding that jurisdiction did exist. The court said:

> "Ramified as is the recounted legislative and treaty history of the original reservation, the solution of our problem turns on two points, was the treaty and 1905 Act a disestablishment of the reservation as to portions ceded, and if so, what was the effect of the 1939 Act." State v. Moss, supra, 471 P.2d at 335.

This court did not give controlling effect to Blackburn v. State, supra, saying:

> "• • • There a different area, a portion of the Riverton reclamation project, was under consideration; and while that site had been a part of the cession effected by the 1905 Act, it had also been the subject of the 1953 Act providing compensation to the Shoshone and Arapahoe Tribes 'deemed to constitute full, complete, and final compensation, • • • and extinguishing all of the right, title, estate, and interest • • • to the lands • • •.'" State v. Moss, supra, 471 P.2d at 337.

Instead, the court limited its rationale to the effect of the Act of March 3, 1905 and held that, despite Art. 9 of that statute, which created a trust relationship in favor of the Shoshone and Arapahoe tribes by the United States, Indian title had been extinguished as to the ceded portion of the Wind River Indian Reservation. The court quoted from United States v. La Plant, 200 F. 92 (D.C. S.D. 1911), the part in which the federal court had addressed earlier the effect of a provision very similar to Art. 9 of the Act of March 3, 1905:

> "'• • • That section declares that the United States does not guarantee to find a purchaser for the land, does not agree to buy the land, and acts only as trustee. But a trustee has not only the legal title, but he has also the right to possession, and the fact that the government is to act as trustee for the Indians does not indicate that their title has not been extinguished. There is nothing in section 9 providing

> that if the land is not sold it shall be turned back to the Indians. The government simply agrees to hold the money realized from the sale of the land, whenever it receives it, for the benefit of the Indians.'" State v. Moss, supra, 471 P.2d at 337, quoting United States v. La Plant, supra, 200 F. at 94.

This court also quoted favorably from State ex rel. Hollow Horn Bear v. Jameson, 77 S.D. 527, 95 N.W.2d 181 (1959), which had construed an act "parallel" to the Act of March 3, 1905, relying on United States v. Pelican, 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1914), and Putnam v. United States, 248 F.2d 292 (8th Cir. 1957). The adopted language states that the Act (36 Stat. 440), described by our conduct to be parallel to the Act of March 3, 1905:

> "'* * * [W]as motivated by a congressional purpose to reduce the area of Pine Ridge * * *. In effect it separated the reservation into two parts. That which the act denominates as the "diminished" reservation, and which we elect to refer to as the "closed" portion of the reservation, was to remain unchanged and to continue to serve the purposes of the government in protecting and dealing with the whole Indian population of the reservation as in the past. The remainder of the reservation, which we will refer to as the "open" portion of the reservation, was to undergo change through a process of settlement into homesteads and townsites. It was contemplated that most of this surplus area would ultimately be settled, patented in fee, and cease to be a part of the reservation and within Indian country. There is no indication that allotted lands in this open area were reserved and excepted to serve the interest of the Pine Ridge Indians as a whole. It seems apparent that the principal reason for reserving these scattered outlying tracts was to permit the government to respond completely to its obligations to the respective allottees

> of these tracts. It is equally apparent that as the Indian title to each of these tracts was extinguished they would cease to serve in furthering any phase of the functions of the government in ministering unto its Indian wards. Thereafter such a tract would bear no different relation to those functions than would an adjoining tract of the open area, the Indian title to which had been extinguished by a homestead patent to a settler. Because the Congress obviously did not contemplate the use of these outlying allotted tracts for any purpose in connection with the superintendence and protection of its Indian wards after the Indian title thereto had been extinguished, we are persuaded that after such an extinguishment it intended they would cease to be both a part of the reservation and of the Indian country." State v. Moss, supra, 471 P.2d at 338, quoting State ex rel. Hollow Horn Bear v. Jameson, supra, 95 N.W.2d at 184-185.

The court concluded that the Act of March 3, 1905 had the effect of extinguishing Indian title and demonstrated an intent that the land should cease to be a part of the reservation and of "Indian country." This court also considered the effect of the Act of July 27, 1939, 53 Stat. 1128, describing this latter statute as one which:

> "• • • [I]nter alia, directed the Secretary of the Interior to establish land-use districts within the diminished and ceded portions of the Wind River Indian Reservation, to restore to tribal ownership all undisposed-of surplus or ceded lands within the land-use district not under lease or permit to non-Indians, and to restore the balance of said lands progressively as the non-Indian owned land within a given land-use district were acquired." State v. Moss, supra, 471 P.2d at 335.

The court was satisfied that the lands within the corporate limits of Riverton had not been included in any of

the restoration orders pursuant to that statute and simply observed that "• • • on its face it restored nothing but rather directed the Secretary of the Interior to restore in certain instances the ceded lands." State v. Moss, supra, 471 P.2d at 339.

In my view, the decisions of this court, premised on a finding that the ceded portion was disestablished, are supported by further investigation into the language of the treaty and the statutory history of the Wind River Indian Reservation. The language incorporated in the 1904 Agreement, which was approved by the Act of March 3, 1905, is substantially the same as that which Congress used to ratify and amend three agreements with the Indians of the Rosebud Reservation. Act of April 23, 1904, 33 Stat. 254; Act of March 2, 1907, 34 Stat. 1230; Act of May 30, 1910, 36 Stat. 448. Article I of the 1904 Agreement provided in pertinent part:

> "The said Indians belonging on the Shoshone or Wind River Reservation, Wyoming, for the consideration hereinafter named, *do hereby cede, grant, and relinquish to the United States, all right, title, and interest* which they may have had to all the lands embraced within the said reservation, except the lands within and bounded by the following described lines: • • •." (Emphasis added.)

Article II provided in pertinent part:

> "In consideration of the lands *ceded, granted, relinquished, and conveyed* by Article I of this agreement, the United States stipulates and agrees to dispose of the same as hereinafter provided under the provisions of the homestead, town-site, coal and mineral land laws, or by sale for cash as hereinafter provided at the following prices per acre: • • •." (Emphasis added.)

Examination of other aspects of the 1904 Agreement confirms that it was the intention of Congress to dis-

established the ceded portion as an Indian reservation and to leave a diminished reservation for the Shoshone and Arapahoe Tribes. In Article III, there is a provision for a sum of $85,000 from the sale of the lands to be used to make a per capita payment of $50 within sixty days of the opening of the ceded lands to settlement. Any remaining balance from this sum set aside for per capita payment was to be used to do those things necessary to secure water rights for any lands remaining the property of the Indians "* * * whether located within the territory to be ceded by this agreement or within the diminished reserve."[1] Perhaps "diminished" was not a word of art in Indian law in 1904. See Solem v. Bartlett, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443, reh. denied 466 U.S. 948, 104 S.Ct. 2148, 80 L.Ed.2d 535 (1984), cert. denied

---

[1] An examination of the entire agreement, in light of prior events, discloses that any property outside the diminished reservation which remained under Indian ownership was limited to property which had been selected by individual Indians, under authority of the 1868 treaty and subsequent acts, and which was located on the portion to be ceded. It pertained to property which the individual Indian refused to exchange for a similar tract on the diminished reservation. Specific provision was made in Article I of the 1904 Agreement that: "* * * [A]ny individual Indian, a member of the Shoshone or Arapahoe tribes, who has, under existing laws or treaty stipulations, selected a tract of land within the portion of said reservation hereby ceded, shall be entitled to have the same allotted and confirmed to him or her, and any Indian who has made or received an allotment of land within the ceded territory shall have the right to surrender such allotment and select other lands within the diminished reserve in lieu thereof at any time before the lands hereby ceded shall be open for entry." The legislative history demonstrates that the policy of the United States of America was to request all Indians to take allotments within the diminished reservation. It was believed that with the exception of 29 allottees, the Indian peoples would surrender their allotments on the lands which they had obtained under the 1868 treaty of Fort Bridger and "* * * select other lands within the diminished reservation, where there is an abundance of good land for the purpose, and which can be more readily and inexpensively irrigated." H.R. Rep. No. 3700, 50th Cong., 3d Sess., pt. 1, at 19 (1905).

—— U.S. ——, 107 S.Ct. 409, 93 L.Ed.2d 361 (1986). In the context in which it was used in the 1904 Agreement, however, it could indicate only the intent to diminish the boundaries of the then-existing reservation. See Oregon Department of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. ——, ——, 105 S.Ct. 3420, 3425 n.11, 87 L.Ed.2d 542 (1985) (indicating express use of the term "diminished reservation" is some indication of congressional intent).

Two other articles in the 1904 Agreement manifest an intent that funds be expended for development of the reservation but only within the diminished reservation. Article IV provided for $150,000 to be expended on an irrigation system "within the diminished reservation." Article VI provided for $50,000 to be expended for "the erection of school buildings and maintenance of schools on the diminished reservation." Further, Article IX of the 1904 Agreement was amended by the Act of March 3, 1905 to include an appropriation of $35,000 for the "survey and field and office examination of the unsurveyed portions of the ceded lands, and the survey and marking of the outboundaries of the diminished reservation, where the same is not a natural water boundary; * * *." This provision manifests an intent to set apart the diminished reservation by establishing boundaries between the diminished and ceded portions. Taken together, the language of the 1904 Agreement expresses a congressional intent to disestablish the ceded portion from the then-existing reservation with the result being a diminished Wind River Indian Reservation.

The amplification of the statutory history demonstrates that Congress intended to disestablish the ceded portion of the reservation, consistent with the prior holdings of this court. The Wind River Indian Reservation was established by Congress as a Shoshone Reservation on July 3, 1868, upon the execution of the Second Treaty of Fort Bridger with the Shoshone and Bannock Indians. In 1878,

the Arapahoe Indians were quartered on the reservation, and it subsequently became a joint reservation for the Shoshone and Arapahoe Tribes. Congressional efforts to reduce the size of the reservation culminated, on October 2, 1891, in an agreement which was reached with the Shoshone and Arapahoe Indians of the Wind River Reservation for the cession of approximately 1,100,000 acres for a consideration of $600,000. H.R. Exec. Doc. No. 70, 52d Cong., 1st Sess., at 23 (1892). The chairman of the commission which had been appointed to negotiate the agreement refused to execute it, however, with his principal reason being that it left the Indians with too much land.

> "The Indians are left as now with too much land. The same complaints which their superabundance of land now gives rise to must necessarily continue. They surrender what is comparatively a small portion of their reservation, considering its value, and a portion from which but little of their former troubles have arisen. The part surrendered is comparatively worthless, and they propose to receive for it what, in the best possible light, is an exorbitant price." H.R. Exec. Doc. No. 70, supra, at 21.

Congress followed the recommendations of the chairman and did not ratify the 1891 Agreement. Instead, Congress authorized the reopening of negotiations for the cession of a larger portion of the reservation. Act of July 13, 1892, 27 Stat. 120.

In January, 1893, a new commission was sent to negotiate but with orders to reduce the Wind River Indian Reservation to 300,000 acres. That commission determined, however, that 650,000 acres were needed for purposes of the reservation. H.R. Exec. Doc. No. 51, 53d Cong., 2d Sess., at 13 (1894). In the course of these negotiations, the representatives of the Indian peoples manifested a desire to sell a large portion of the reservation, which they felt white ranchers were using without pay-

ment or permission, but they refused to sell any portion of the reservation south of the Wind River. Chief Washakie of the Shoshone Tribe expressed their position:

> "I guess we will not trade, I tell you now that I will not sell this land on the south side, I am done talking about it." H.R. Exec. Doc. No. 51, supra, at 18.

There is no record of any further negotiations of significance until April 21, 1896, when Inspector James McLaughlin successfully negotiated an agreement to cede 55,040 acres for $60,000, including some hot springs (Thermopolis) which the government desired to open for public use. That agreement was approved by Congress on June 7, 1897. S. Doc. No. 247, 54th Cong., 1st Sess. (1896); H.R. Doc. No. 5, 55th Cong., 2d Sess., at 34-36, 406-408 (1897). Although not related directly to subsequent negotiations, this agreement did set the stage for negotiations that later led to the passage of the Act of March 3, 1905. See J. McLaughlin, *My Friend the Indian*, ch. XXVII (1910); L. Pfaller, *James McLaughlin, The Man with an Indian Heart*, ch. XIII (1978).

On March 4, 1904, Representative Mondell of Wyoming introduced H.R. 13481 entitled "A Bill to ratify and amend an agreement with the Indians residing on the Shoshone or Wind River Indian Reservation, in the State of Wyoming, and to make appropriations for carrying the same into effect." 38 Cong. Rec. at 2843 (1904), printed in entirety in 38 Cong. Rec. at 5245-5247 (1904). Among the purposes of this bill was ratification of the 1891 Agreement, but it, in fact, included substantial amendments to that agreement, providing, among other things, for a larger cession of land and a change in the manner of payment from a sum certain to proceeds from the sale of the land. H.R. Rep. No. 2355, 58th Cong., 2d Sess. (1904). The purpose of the bill was exactly the same as that of the agreement; to reduce the size of the Wind River Indian Reservation to an area

better suited to the needs of the Indians and the United States. The Committee on Indian Affairs commented on H.R. 13481:

> "H.R. No. —— proposes to reduce the reservations, as suggested by Mr. Woodruff at the time of the making of the Agreement of 1891, and in this connection it should be remembered that the instructions to the commission in 1891 were to reduce the reservation from 650,000 to 700,000 acres. The bill in question still leaves the Indians with 808,500 acres. A careful estimate by the General Land Office gives the area of the lands proposed to be ceded by the above bill at 1,480,000 acres, leaving 808,500 acres in the diminished reserve. There are 1,650 Indians on the reservation at this time, so that the diminished reserve leaves about 500 acres per Indian man, woman, and child, on the reservation.
>
> "The diminished reserve is by all means the best portion of it, although there are some good lands in the ceded tract. The diminished reserve is, however, a particularly well-watered, well-grassed country, a considerable portion of which is susceptible of irrigation, several thousand acres being now under irrigation and farmed by the Indians." H.R. Rep. No. 2355, supra, at 3.

The Committee on Indian Affairs favored Mondell's bill but suggested an amendment requiring the consent of the Indian peoples. H.R. Rep. No. 2355, supra at 2. James McLaughlin, the United States Indian Inspector who had negotiated successfully the Rosebud and Devil's Lake Agreements and the 1896 Agreement with the Indians of the Wind River Reservation, was chosen to seek the consent of the Shoshone and Araphoe Tribes to the amendment. McLaughlin arrived at the Wind River Indian Reservation on April 15, 1904, and, six days later, he reached an agreement which he described in this way:

> "* * * [A]long the lines of the 'Mondell Bill' as to boundaries and manner of payment, but with some modifications of certain of its provisions, which, as I regard it, is in the interests of the Government and, at the same time, more beneficial and pleasing to the Indians." Letters of James McLaughlin (Microfilm Roll 26 at 12).

It is reflected in the minutes of the council meeting at which this agreement was discussed that both Inspector McLaughlin and the representatives of the Indian peoples understood that Congress intended the sale of a large portion of the Wind River Indian Reservation, for which compensation was to be made in accordance with the Mondell Bill.

> "* * * The President and the Secretary of the Interior are desirous to have you sell your surplus lands and open them to settlement as much so as Congress, but at the same time, they are desirous to see that the Indians have full compensation for such lands ceded to the government. For several years past there has been a sentiment in Congress, and one that is growing stronger each succeeding year, opposed to paying the Indians a lump sum consideration for their lands. Instead of stipulating, or providing in the agreement, a lump sum consideration for any tract of land, they have determined upon giving the Indians the full benefit of the land by paying the Indians from the proceeds of the sale of the land as white men settle upon it. Several agreements with tribes of Indians that provided for a lump sum consideration which were presented to Congress the past two years have not been ratified, for the reason that Congress has refused to act upon any such agreements, and the said agreements have had to be changed before they could be carried out. I have made this explanation that you may know my reasons for not being able to entertain a prop-

osition from you people for a lump sum consideration. Understand that anything you may receive from these lands will be paid to you from the proceeds of sales of same to white men.

* * * * *

"In days gone by, years ago, when your reservation was set apart, large reservations were possible, because the white man did not desire the lands, but the tide of immigration is now pressing from both east and west, white men are clamoring for additional lands, and all lands that the Indians have no need of, must be opened for settlement, the department having charge of the Indians cannot prevent it, and can only secure them by giving them homes and allotments in severalty, and that is why I am here today, to present to you an agreement for disposing of the lands that you do not need.

"For the purpose of having the surplus lands of your reservation open to settlement and realizing money from the sale of that land, which will provide you with means to make yourselves comfortable upon your reservation, a bill has been introduced in Congress called the 'Mondell Bill.' which I will read. It has been presented and reported favorable from the Committee on Indian Affairs of the House, and is now awaiting action on the part of you people before it is taken up in the Senate." (Thereafter the Mondell Bill was read to the Indians by Inspector McLaughlin.) McLaughlin Letters (Microfilm Roll 26 at 26-27).

There can be no question that the representatives of the Indian peoples understood that the agreement and the bill contemplated an outright sale of a large portion of the Wind River Indian Reservation. Among the remarks of the participants were:

LONE BEAR,
ARAPAHOE:

> "I understand what he comes for, and I will let him know what I think of it, and I will tell what part of the Reservation I want to sell."

REVEREND SHERMAN
COOLIDGE, ARAPAHOE:

> "I am glad that Major McLaughlin has come to us to purchase a portion of our reservation. The proposed ceded portion has not been used by us except for grazing purposes, and I think cash money will be of more value among the Arapahoes and Shoshones. I am in favor of the 'Mondell Bill' along the lines, with slight changes that we discussed with the Shoshones last night."

GEORGE TERRY,
SHOSHONE:

> "It is not like selling a wagon, a horse, or something of that nature, but it is something we are parting with forever, and can never recover again."
>
> McLaughlin Letters (Microfilm Roll 26 at 32, 35 and 40.)

Clearly, the Indian representatives understood the Mondell Bill. They suggested changes in certain provisions relating to the expenditure of the moneys to be received from the sale of the lands and requested a resurvey of the western boundary of the diminished portion of the reservation to make it conform with the 1868 treaty. They also requested a provision that the agreement require the signatures of a majority of male Indians over eighteen from both tribes. Inspector McLaughlin reported on his negotiations with the Indian peoples in this way:

"The diminished reservation leaves the Indians the most desirable and valuable portion of the Wind River Reservation and the garden spot of that section of the country. It is bounded on the north by the Big Wind River, on the east and southeast by the Big Popo-Agie River, which, being never failing streams carrying a considerable volume of water, give natural boundaries with well-defined lines; and the diminished reservation, approximately 808,000 acres, about three-fourths of which is irrigable land, allows 490 acres each for the 1,650 Indians now belonging on the reservation. I gave this question a great deal of thought and considered every phase of it very carefully and became convinced that the reservation boundary, as stipulated in the agreement, was ample for the needs of the Indians belonging thereto; that by including any portion of the lands north of the Big Wind River or east of the Big Popo-Agie River in the diminished reservation it would only be a short time until the whites would be clamoring to have it open to settlement, and the Indians would be eventually compelled to give it up. Furthermore, with the exception of about 20 families (mixed bloods and white men who are intermarried into the tribes) there are no Indians occupying lands outside of the diminished reservation." Letter of James McLaughlin, United States Indian Inspector, to the Secretary of Interior, April 25, 1904, printed in full in H.R. Rep. No. 3700, 58th Cong., 3d Sess., supra, pt. 1, at 15-19.

The Mondell Bill, H.R. 13481, resembled the proceding 1891 Agreement in that it proposed to disestablish the ceded portion of the then-existing Wind River Indian Reservation resulting in a diminished reservation to be inhabited by the Shoshone and Arapahoe Indians. That particular bill, however, was not adopted by Congress. Changes to the bill which had been suggested by the In-

dian peoples and accepted by Congress, along with further amendments to the bill such as the Asmus Boysen provision [2] made it necessary that a new bill "be passed in lieu of H.R. 13481." The new bill was H.R. 17994. See H.R. Rep. No. 3700, supra, pt. 1, at 1-3. This is the bill which, after extensive debate in both houses and the adoption of a committee resolution relating to a disagreement between the House of Representatives and the Senate, ultimately passed as the Act of March 3, 1905. The intent of H.R. 17994 was consistent with and very much the same as that of H.R. 13481 and the 1891 Agreement.[3]

---

[2] This amendment was to Art. II of the 1904 Agreement to include a provision providing that one Asmus Boysen have a preferential choice of 640 acres in the ceded portion in exchange for any interest he had under a pre-existing mineral lease with the Shoshone and Araphoe Indians on certain lands of the ceded portion. There was a dispute over this amendment because some members of the Indian Affairs Committee felt that Boysen's interest would terminate automatically with the passage of the Act. Section 13 of Boysen's lease did provide:

> "'In the event of the extinguishment, with the consent of the Indians, of the Indian title to the lands covered by the lease, then and thereupon this lease and all rights thereunder shall terminate.'" Quoted in H.R. Rep. No. 3700, 50th Cong., 3d Sess., pt. 2, at 3 (1905).

The minority report contended that, because of the granting language of the agreement, Indian title would be extinguished, and Boysen's interest thereupon would disappear. Representative Lacey of Iowa had proposed the amendment to protect any interests that one of his constituents might have in Boysen's lease. Representative Lacey argued that the provision was necessary because under the Mondell Bill the Indian title would not be lost until five years after entry by settlers. He argued that the trust would be burdened if the lease were not canceled in accordance with the amendment. Ultimately, the House and the Senate concurred in this amendment.

[3] The majority correctly perceive the 1896 Agreement, relating to the Thermopolis hot springs, as having divested the Indian peoples of any interest in the water rights to the portion of Wind River Indian Reservation ceded by that agreement. It is not clear why, having reached that conclusion, the 1891 Agreement, as approved by the Act of March 3, 1905, should lead to a different conclusion.

[Continued]

From the initial negotiation in 1891 to passage of the Act of March 3, 1905, the history of the 1904 Agreement and the legislation demonstrate that Congress intended the cession of a large portion of the then-existing Wind River Indian Reservation by disestablishing the ceded portion and recognizing a diminished reservation. The provisions of the Act of March 3, 1905, H.R. 17994, were considered most carefully by Congress. Congressman Mondell had continued with his efforts to have H.R. 13481 passed through both houses while James McLaughlin remained in Wyoming. Congressman Mondell had offered amendments to conform to suggestions by the Committee on Indian Affairs, and as amended, the House had passed the bill. 38 Cong. Rec., supra, at 5247-5248. The bill then had been read in the Senate and referred to the Senate Committee on Indian Affairs. 38 Cong. Rec.,

---

[3] [Continued]

The legislative history furnishes no hint that Congress might have perceived it was obtaining any lesser interest in the land under the 1904 Agreement than that which would have been obtained under the 1891 Agreement. The extensive debate on several provisions of the Act of March 3, 1905, coupled with the lack of any reference to the admission of an expressed cession of water rights under the Mondell Bill, indicates Congress did not perceive the provision as important. The reference to appertaining water rights, in the 1896 Agreement, should not be afforded any greater significance than that included in the October 2, 1891 Agreement, which also referred to appertaining water rights. The 1896 Agreement contained very similar language to the 1891 Agreement, and the 1891 Agreement substantially was implemented by the Act of March 3, 1905, which had very similar language to that included in the Rosebud Agreement. The Rosebud Agreement was debated extensively and passed by the House just prior to Representative Mondell's introduction of H.R. 13481, a bill "to ratify and amend an agreement with the Indians residing on the Shoshone or Wind River Indian Reservation * * *." See 38 Cong. Rec., at 1423, 1643, 1899 and 2843 (1904). Certainly, a sale for a sum certain, provided for in the 1891 and 1896 Agreements but not provided for in H.R. 13481 or H.R. 17994, could not be controlling. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977).

supra, at 5294. The Senate Committee had recommended passage with additional amendments. 38 Cong. Rec., supra, at 5671; S. Rep. No. 2621, 50th Cong., 2d Sess. (1904), and the bill had been passed with amendments by the Senate on April 27, 1904. 38 Cong. Rec., supra, at 5707. The House was unable to accede to the Senate amendments before that session of Congress adjourned.

When H.R. 17994 was offered in the third session by Representative Marshall, in lieu of H.R. 13481, its purpose was to amend and ratify the April 21, 1904 Agreement with the Indian peoples residing on the Shoshone or Wind River Indian Reservation in the State of Wyomin. 39 Cong. Rec., at 1112 (1905). This new bill was sent to the House Committee on Indian Affairs, which split over the Asmus Boysen Amendment, but which also proposed the following amendment:

> "*Provided*, that the constitution and laws of the State of Wyoming shall not operate to secure any rights, having priority to those members of the Shoshone tribe of Indians, to the use of the waters within the territory hereby open to sale and settlement, including Big Wind River and its tributaries, for purposes of irrigation of the lands comprised within such territory, until such time as the United States shall have perfected allotments to the members of the Shoshone Indian tribe, either from the lands to be opened for settlement or within the diminished reservation of said Indians, and completed the necessary steps under the law to secure the desired water rights for the said allotments." H.R. Rep. No. 3700, supra, pt. 1 at 7.

When the bill was returned to the House, it was passed after coniderable debate and some difficulty, and with the Boysen Amendment removed. The bill then went to the Senate and was referred to the Senate Committee on Indian Affairs. That committee reported back with the recommendation of passage with amendments. One of

those was to reinsert a modified provision for the Boysen Amendment previously struck in the House. Yet another amendment removed the House amendment quoted above relating to the inhibition on settlers with respect to obtaining perfected water rights under Wyoming law before the Indians' water rights could be perfected. The bill passed the Senate with these amendments and was sent back to the House. After a motion was passed to disagree with the Senate amendments, a conference committee was appointed. The recommendation of the conference committe was that the House should recede from disagreeing with the Senate amendments and after further debate the conference report was passed by the House. 39 Cong. Rec., supra, at 3886-3887. The bill then was sent in its final form to the president and enacted as the Act of March 3, 1905. 39 Cong. Rec., supra, at 3974, 4033.

Representative Marshall spoke on the floor of the House:

> "Mr. Speaker, the gentleman from Wyoming [Mr. Mondell] has well said that this bill has had more careful consideration than any bill of this character that has been before the Indian Committee, and there is but one possible objection to it, and that is the objection to giving this preferential right to 640 acres to Mr. Boysen. I was chairman of the subcommittee that considered that question, and we considered it long and carefully and conscientiously, and ultimately decided that, as a matter of equity, Mr. Boysen was entitled to this preferential right." 39 Cong. Rec., supra, at 1945.

It is of particular moment to note that an amendment to inhibit the operation of the constitution and laws of the State of Wyoming so as to secure any rights to the use of waters within the ceded territory was defeated.

The legislative history subsequent to the passage of the Act of March 3, 1905 demonstrates an understanding

that the ceded portion of the Wind River Indian Reservation had been disestablished. A discussion on appropriations for the construction of an irrigation project on the Shoshone or Wind River Indian Reservation can be found in hearings before the House Committee on Indian Affairs relating to H.R. 12579. Indian Appropriation Bill, Hearings on H.R. 12579, Before the Senate Committee on Indian Affairs, 63d Cong., 2d Sess., at 279-281 (1914). In those hearings, Mr. Merritt offered the following clause to be attached as a provision to a $25,000 appropriation:

> "*Provided*, That the use of so much water as may be necessary to supply for domestic, stock watering, and irrigation purposes, land allotted or to be allotted to Indians on the diminished Shoshone or Wind River Reservation, in Wyoming, or set aside for administrative purposes within said reservation is hereby reserved, and the failure of any individual Indian or Indians to make beneficial use of such water shall not operate in any manner to defeat his or her right thereto while said land is held in trust by the United States. All laws and parts of laws in conflict herewith are hereby repealed."

Mr. Merritt then read from a memorandum which stated:

> " 'The purpose of this and other similar legislation in this bill is to protect the rights of Indians to water on Indian reservations and on allotted Indian lands held under trust or by other patents containing restrictions on alienation.
>
> " 'To establish more certainly and securely water rights of Indians is a matter of the greatest importance in administering satisfactorily their affairs. On a number of reservations where Indians have been allotted, the land is practically of no value for agricultural purposes without irrigation. Water on these reservations is a vital factor in developing the

Indians living thereon so that they become self-supporting and be raised to a higher standard of civilization.

" 'The Supreme Court in the case of Winters v. United States (207 U.S., 564), said that "The power of the government to reserve waters and exempt them from appropriation under the State laws is not denied, and could not be."

" 'The Supreme Court further said in this case that there was an implied reservation for the benefit of the Indians of a sufficient amount of water from the Milk River for irrigation purposes which was not affected by the subsequent act of February 22, 1889 (25 Stat. L., 676), admitting Montana to the Union, and that the water of the Milk River cannot be diverted so as to prejudice the rights of the Indians by settlers on the public lands and those claiming riparian rights on that river.

" 'It is believed that the general principles laid down in the Winters case are applicable to all Indian reservations where there are no specific acts of Congress to the contrary. However, I find that the very favorable decision of the Supreme Court in the Winters case regarding the water rights of Indians has been practically nullified by various acts of Congress, and as a result of such legislation the water rights of Indians are now dependent on beneficial use in a number of reservations where the Government has been, and is now, spending large amounts of reimbursable funds, and by acts of Congress those water rights are subject to the laws of several of the States wherein these irrigation projects are located.' " Memorandum referred by Mr. Merritt, reported in Indian Appropriation Bill, Hearings on H.R. 12579, supra, at 280.

This statement of purpose is consistent with a policy, implemented following the passage of the Act of March

8, 1905, to encourage all of the Indians of the Wind River Reservation to reside only on the diminished portion. The annual report of the Secretary of Interior for 1906 included this comment:

> "W.B. Hill, superintendent of irrigation, has been instructed to make surveys of ditches in use and of those necessary to be constructed on the Shoshone Reservation so as to give water to each allottee if possible and in order to apply for permit to appropriate waters under the laws of Wyoming. He was advised that in the beginning only such construction should be made as might be necessary to maintain priority of water rights and that any system of irrigation planned should be within the diminished reservation. In revising and completing allotments to the Indians on that reservation it is the policy of the Office to make new allotments within the diminished reservation, and to encourage Indians who have received allotments north of Big Wind River to relinquish them and agree to take other lands in lieu thereof within their diminished reservation." H.R. Doc. No. 5, 59th Cong., 1st Sess., at 155 (1905). Also see Letter to Walter B. Hill from Department of Interior, August 11, 1904, Act of August 1, 1914 (38 Stat. 582 § 24) (1914).

It is noteworthy that construction for an irrigation project was restricted to the diminished reservation; Congress was concerned with protecting the water rights of Indians on reservations and certain Indian allotments not within reservation boundaries; it was understood that despite Winters v. United States, supra, federal action might be necessary to protect Indian reservation water rights; and there was a complete absence of any concern for protecting any water rights appurtenant to the ceded lands, other than lands owned by Indian allottees. All this strongly indicates an understanding of Congress that a sufficient interest in the ceded land had

not been retained by the Indians so that any reserved water rights appurtenant to the ceded portion were retained. See also Act of August 1, 1914 (38 Stat. 582, § 24, supra) (enacting H.R. 12579, as amended, and providing funds for construction of the irrigation system, roads and bridges within the diminished reservation manifesting an intent for the Indian peoples to corporately reside within the boundaries of the diminished reservation).

The intent to disestablish the ceded portion also is supported by the treatment in the 1904 Agreement of Sections 16 and 36 in those surveyed townships within the ceded portion of the reservation. An amendment to that agreement deleted a provision in Article II for the purchase of lands in lieu of Sections 16 and 36 of the ceded portion by the United States for $1.25 per acre. The deletion of this provision was accomplished by an amendment of Representative Mondell who explained that it was believed to leave Wyoming "authorized under the enabling act to take lieu land." 38 Cong. Rec., supra, at 5247. The effect of this amendment is to demonstrate further the understanding of Congress that passage of the Act of March 3, 1905 not only would disestablish the ceded portion but also would extinguish Indian title to the ceded portion. The Wyoming Act of Admission provided that Sections 16 and 36 in every township in Wyoming were granted to the State for the support of common schools and provided that the State could select equivalent lands if Sections 16 and 36 had been sold or otherwise disposed of by the authority of any act of Congress. Act of July 10, 1890, 26 Stat. 222, § 4. The obvious concern of this amendment by Representative Mondell was that the Act of March 3, 1905 had the effect of removing the ceded portion from the disclaimer in Article 21, Section 26 of the Constitution of the State of Wyoming, disavowing any claim of a state interest in lands reserved for the Indians. Further, there was a concern that such provisions for school lands extended

only to public federal lands. See Minnesota v. Hitchcock, 185 U.S. 373, 22 S.Ct. 650, 46 L.Ed. 954 (1902); Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 601 n.23, 97 S.Ct. at 1370 n.23. If the effect of the act of March 3, 1905 was to restore the ceded lands to the status of public federal lands and to avoid the inhibition of the Wyoming Constitution, then Wyoming could claim Sections 16 and 36 in townships on the ceded portion of the reservation. Since apparently no payment would be required by the United States for Sections 16 and 36, the amendment removed the requirement to pay for lieu lands selected because of the disposal of Sections 16 and 36. This proviso was different from that involved in Rosebud Sioux Tribe v. Kneip, supra, in which the United States had been required to purchase Sections 16 and 36 for the benefit of South Dakota. Unless the ceded portion was disestablished as a reservation, however, the amendment to delete the requirement to pay for lieu lands had no significance.

A parallel history with respect to the Wind River Indian Reservation developed in the executive branch of the federal government. The presidential proclamation of June 2, 1906 states:

> "WHEREAS, By an agreement between the Shoshone and Arapahoe tribes of Indians, belonging to the Shoshone or Wind River reservation in the State of Wyoming, on the one part, and James McLaughlin, a United States Indian Inspector, on the other part, amended and ratified by act of Congress approved March third, nineteen hundred and five (33 Stat., 1016), the said Indian tribes ceded, granted, and relinquished to the United States all the right, title, and interest which they may have had to all of the unallotted lands embraced within said reservation, except the lands within and bounded by the following described lines:
>
> * * * * *

> "NOW, THEREFORE, I, THEODORE ROOSEVELT, President of the United States of America, by virtue of the power in me vested by the said Act and Resolution of Congress, do hereby declare and make known that all the unallotted lands in the ceded portion of said reservation, except such as may at that time have been reserved for carrying out the provisions of said amended treaty relative to the rights of Asmus Boysen, allowing him to locate in accordance with the Government surveys not to exceed 640 acres in the form of a square, of mineral or coal lands in said reservation, and to purchase the same, will, on and after the fifteenth day of August, nineteen hundred and six, in the manner hereinafter prescribed, and not otherwise, be open to settlement, entry, and disposition under the general provisions of the homestead, townsite, coal, and mineral land laws of the United States." 34 Stat., pt. 3, at 3208.

The language found in that proclamation expresses "an unambiguous, contemporaneous, statement, by the Nation's Chief Executive, of a perceived disestablishment" of the ceded portion of the Wind River Indian Reservation. See Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 602-603, 97 S.Ct. at 1371.

After passage of the Act of March 3, 1905, the Department of the Interior of the United States published maps of the Wind River Indian Reservation which reflect an understanding of the executive department that the Indian peoples had not retained a sufficient interest in the ceded portion of those lands to cause the Department of Interior to consider it an Indian reservation. The Department of the Interior's map of the State of Wyoming for 1892 shows the Wind River or Shoshone Indian Reservation boundaries to exist as stated by treaties prior to the 1896 Agreement. The Department of the Interior's map for 1900 shows the reservation slightly reduced by the cession under the 1896 Agreement. Sim-

ilarly, the Department of the Interior's maps for 1907 and 1912 reflect a dramatic decrease in the boundaries of the Wind River or Shoshone Indian Reservation, excluding the ceded land from that area known as the Wind River or Shoshone Indian Reservation. Dinsmore, A.F., compiler, *State of Wyoming*, United States Department of the Interior, General Land Office, 1892, scale 1:12, 1 sheet; King, H., compiler, *Map of the State of Wyoming*, United States Department of the Interior, General Land Office, 1900, scale 1:12, 1 sheet; Berthrong, I.P., compiler, *State of Wyoming*, United States Department of the Interior, General Land Office, 1907, scale 1:12, 1 sheet; Berthrong, I.P., compiler, *State of Wyoming*, United States Department of the Interior, General Land Office, 1912, scale 1:12, 1 sheet.

This legislative and executive history subsequent to the passage of the Act of March 3, 1905 supports only one conclusion: a status of an Indian reservation was intended and understood only for the diminished reservation; the Indians corporately would reside on the diminished reservation, and any of those who continued to live on the ceded portion would do so only as private allottees.

Finally, an understanding by the United States that the ceded portion was disestablished from the reservation is demonstrated by acquiescence in the decisions of this court upholding state jurisdiction over the ceded portion. The effect of this unquestioned and consistent exercise of jurisdiction by the State of Wyoming over certain lands within the ceded portion is well expressed in Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 604, 97 S.Ct. at 1372, 51 L.Ed.2d 660 (1977), in which the court said:

> "• • • [T]he fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as a part of the 'jurisdictional history'."

The cases decided by this court and the very intriguing legislative and executive department history all are compatible with federal precedent relating to the disestablishment of an Indian reservation. Disestablishment abrogates appurtenant rights. Implied water rights on Indian reservations, founded upon the reserved rights doctrine, are extinguished by acts of Congress inconsistent with recognition of their existence, even though they are not subject to state law concerning the abandonment or extinguishment of a water right. See United States v. Anderson, 591 F.Supp. 1 (E.D.Wash. 1982). There appears to be no question that Congress may limit or extinguish Indian title,[4] and any rights appurtenant to the title, without obtaining the consent of the Indian peoples. Solem v. Bartlett, supra; Rosebud Sioux Tribe v. Kneip, supra; Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed.2d 299 (1903); Ute Indian Tribe v. State of Utah, 716 F.2d 1298 (10th Cir. 1983), cert. denied —— U.S. ——, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986).

The cases hold that when Congress extinguishes the title of Indian peoples to a portion of any land, any hunting and fishing rights appurtenant to the land, to the extent that recognition of such right is inconsistent with extinguishment of the title, is limited impliedly or extinguished also. Oregon Department of Fish and Wild-

---

[4] Applying a strict concept of title, fee title to Indian lands has been vested in the United States of America under the doctrine of discovery, with the Indian peoples retaining a right to possess and occupy that land. Their right of occupancy is good against all except the sovereign, who may terminate the right at will, although perhaps just compensation must be provided prior to termination. See Oneida Indian Nation of New York State v. Oneida County, New York, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974); Shoshone Tribe of Indians v. United States, 299 U.S. 476, 57 S.Ct. 244, 81 L.Ed. 360 (1937). See generally F. Cohen, Handbook of Federal Indian Law, at 486-493 (1982); P. Maxfield, M. Dieterich & F. Trelease, Natural Resources Law on American Indian Lands, at 17-19 (1977).

life v. Klamath Indian Tribe, supra; Puyallup Tribe, Inc. v. Department of Game of State of Washington, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689, reh. denied 393 U.S. 898, 89 S.Ct. 64, 21 L.Ed.2d 185 (1968); Ward v. Race Horse, 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 (1896). Cf. Menominee Tribe of Indians v. United States, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). In several cases, the Supreme Court of the United States has said that water rights implied because of the reserved rights doctrine are appurtenant to the federal lands actually set aside by Congress. See United States v. New Mexico, 438 U.S. 696, 698, 98 S.Ct. 3012, 3013, 57 L.Ed.2d 1052 (1978) (defining a federally implied reserved water right as one reserved for future use "on appurtenant lands withdrawn from the public domain for specific federal purposes"). See also Arizona v. California, supra; Cappaert v. United States, 426 U.S. 128, 99 S.Ct. 2062, 48 L.Ed.2d 523 (1976); Winters v. United States, supra.

The implied water right which is reserved is limited to that amount of water necessary to fulfill the purposes for which the land itself was reserved. Cappaert v. United States, supra. It should not matter what purpose the appurtenant rights were intended to accomplish, and the extinguishment of appurtenant water rights by implication should be as inevitable as the extinguishment of appurtenant hunting and fishing rights by implication. Once the Congress determines that the land previously set aside for some federal purpose no longer is required for that purpose, any appurtenant water rights reserved by implication no longer are necessary to accomplish the purpose initially intended. The issue to be resolved is whether the congressional action demonstrates that the land no longer is required for the purpose for which it originally was reserved. The appropriate inquiry then is whether congressional action manifests an intent that land previously set aside for the purpose of the Shoshone

or Wind River Indian Reservation no longer was required to accomplish the purpose of an Indian homeland.

The Supreme Court of the United States in several cases has recognized the relevant considerations to be pursued in determining whether Congress intended to disestablish a portion of the land from an existing reservation. See e.g., Solem v. Bartlett, supra; Rosebud Sioux Tribe v. Kneip, supra; Ute Indian Tribe v. State of Utah, supra.

> "* * * The underlying premise is that congressional intent will control. In determining this intent, we are cautioned to follow 'the general rule that "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." ' The mere fact that a reservation has been open to settlement does not necessarily mean that the opened area has lost its reservation status. But the 'general rule' does not command a determination that reservation status survives in the face of congressionally manifested intent to the contrary. In all cases, 'the face of the Act.' the 'surrounding circumstances,' and the 'legislative history,' are to be examined with an eye toward determining what congressional intent was." (Citations omitted.) Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 586-587, 97 S.Ct. at 1365.[6]

---

[6] The Indian peoples who participated in the negotiation with respect to the 1904 Agreement do not appear to have been weak and defenseless as suggested in the quoted language. James McLaughlin described George Terry as a mixed blood spokesman for the Shoshone Indians "* * * whose gift of language and acquirements made him a man to be regarded with some respect." James McLaughlin, *My Friend the Indian*, at 296 (1910). George Terry spoke at the counsel meeting in April, 1904 and explained the Indian peoples' understanding of the 1904 Agreement.

> "Major McLaughlin, our worthy agent, Ladies and Gentlemen: This is no little bargain we are entering into. It is not like

In Rosebud Sioux Tribe v. Kneip, supra, the Supreme Court construed treaty language substantially similar to the language in the 1904 Agreement relating to the Wind River Indian Reservation. The Supreme Court said that such language is " 'precisely suited' " to demonstrate an intent to disestablish a ceded portion of land from a reservation and creates "an unmistakable baseline purpose of

---

selling a wagon, horse, or something of that nature, but it is something we are parting with forever, and can never recover again. These lands that we are about to dispose of have been our lands for ages. They have been our lands by inheritance for many, many years before the white man came this way. These same lands have been our lands by conquest. Our fathers fought with every nation that came near them and came off victorious, and from that date to this, they held this land as their own. These lands are our lands by treaty stipulations. We have given up vast tracts for this little tract of land called the Wind River Reservation. Now, we are glad our Arapahoe friends came in, and we will join hands with them and endeavor to pass a measure here that will follow the lines of this 'Mondell bil.' " Minutes of Council Meeting at the Wind River Reservation, April, 1904, Letters of Inspector James McLaughlin, Microfilm Roll 26 at 40.

Concluding his remarks, Terry said:

> "Now, Major, We all thank you very much for the feast, but we want it understood, that we do not give our consent to your agreement because you have filled us with beef, bacon, sugar, flour and coffee. It has gone upon record that all the white man has to do, to get the consent of the Indian to anything he desires, is to fill him up with what he likes. I want it to go on record, that notwithstanding the fact that we have been feasted, we have considered this bill in a sober and thoughtful manner, and for the benefit of every man, woman, and child on the reservation." Minutes of Council Meeting at the Wind River Reservation, April, 1904, Letters of McLaughlin, supra, Microfilm Roll 26 at 43.

Of course, the understanding of the Indian peoples is relevant only to the extent that it explains Congressional intent because the actions of Congress in diminishing an Indian reservation do not depend on consent of the Indians. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed.2d 299 (1903).

disestablishment." Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 592, 597, 97 S.Ct. at 1366, 1368, quoting DeCoteau v. District County Court, 420 U.S. 425, 445, 95 S.Ct. 1082, 1093, 43 L.Ed.2d 300 (1975). It appears that the face of the act approving the 1904 Agreement demonstrates an intent to disestablish the ceded portion. That intent is substantiated by an examination of the legislative history.[6]

The decisions of this court not only are consistent with the legislative history relating to the Wind River Indian Reservation but also are consistent with the conclusions of the Supreme Court of the United States in similar instances. "The face of the act," the "surrounding circumstances," and the "legislative history" all serve to manifest a congressional intent to disestablish the ceded portion of the Wind River Indian Reservation. It follows that the ceded portion has not been an Indian reservation, intended to supply an Indian homeland for the Shoshone and Arapahoe tribes since 1905. Under those circumstances, there is no justification for invoking the reserved rights doctrine with respect to those areas identified as practicably irrigable acreage on the ceded portion and including them in the quantification of water set aside for the Indian peoples. I would eliminate those lands from the formula in their entirety.

---

[6] The dissenting opinion in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977), notes that the manner of payment was not approved by the required majority of the Indians. This resulted in concerns by the dissenting justices as to compliance with the legal meaning of the word "cede." In the case of the 1904 Agreement as to the Wind River Reservation, the manner of payment expressly was discussed with the Indian representatives from the Wind River Reservation, and they agreed to it. While the special master decided that Rosebud Sioux Tribe v. Kneip, supra, is distinguishable because the word "convey" was omitted in Article I of the 1904 Agreement, that conclusion fails to acknowledge the inclusion of the word "convey" in Article II, which refers back to Article I and, in my judgment, places undue emphasis on the omission of the word in Article I.

HANSCUM, District Judge, dissenting.

I join in the dissent. Specifically, I would agree with the dissent's proposed holding that the implied reservation of water rights attaching to an Indian reservation should assume any use that is appropriate to the Indian homeland as it progresses and develops.

I depart, however, when Justice Thomas proposes to limit water use to the territorial boundaries of the reservation, thus precluding marketability of the water. Justice Thomas would hold that, as a matter of law, marketing water off the reservation never could be appropriate to the progress and development of the Indian homeland.

I disagree. I would go that additional step. I would hold that sale of water off the reservation should be permitted, provided that, as a factual matter, it could be demonstrated that such marketing contributed to the progress and development of the Indian homeland. I can envision a variety of scenarios where such showing could be made successfully. To preclude the opportunity of proving such a nexus unduly would restrict and hamper the prospective development of the Indian homeland in the future.

APPENDIX B

IN THE SUPREME COURT
STATE OF WYOMING

APRIL TERM, A.D. 1988

Nos. 85-203, 85-204,
85-205, 85-217,
85-218, 85-225,
85-226, 85-236

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING.

ORDER DENYING PETITION FOR REHEARING

This case came on before the court upon the Petitions for Rehearing filed on March 25, 1988, by the State of Wyoming, the United States and the Shoshone and Northern Arapaho Tribes, respectively, and the court having carefully considered the matters presented therein, including the record and the opinion of the court, finds that the Petitions for Rehearing should be denied, and it therefore is

ORDERED that the Petitions for Rehearing be, and the same hereby are, denied.

Dated April 22nd, 1988.

BY THE COURT

/s/ C. Stuart Brown
C. STUART BROWN
Chief Justice

APPENDIX C

IN THE DISTRICT COURT
FOR THE FIRST JUDICIAL DISTRICT
STATE OF WYOMING, COUNTY OF LARAMIE

Docket No. 101-234

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING.

[Filed May 24, 1985]

ORDER, DENYING TREATY PRIORITY DATE MODIFYING AND CORRECTING FINDINGS OF FACT AND CONCLUSIONS OF LAW, RULING ON CERTAIN SPECIFIED CLAIMS, AND DEFERRING ACCEPTANCE OF RECOMMENDED FINAL DECREE IN THE SPECIAL MASTER'S SUPPLEMENTAL AND FINAL REPORT

This Decision reviews the Special Master's "Supplemental and Final Report" dated June 1, 1984, which concerns that portion of the general adjudication of all the rights to use water in the Big Horn River System and all other sources, dealing with claims of twenty-six (26) non-Indian parties for water rights based on the purchase of land by a non-Indian from an Indian allottee or successor. All the land was included originally within the Wind River Indian Reservation of 1868.

After submission of the Special Master's Report to the Court, a hearing was held in Lander, Wyoming, on September 28, 1984, to determine whether the Report should be confirmed. Subsequently, the Court raised questions about what factors distinguished this group of claimants from those other claimants similarly situated who have not appeared, inviting comments by letter. Responses have been received, generally indicating that there is no significant distinction. Therefore, it is the determination of the Court that these claims have no special distinction which demand that they receive special and separate consideration. The factual issues will be similar to those of other parties to be reviewed at a later time.

The Court will, however, discuss the general points of law applicable to these parties. Claimants are seeking a reserved water right with an 1868 Treaty priority date ("Walton rights"), and in the alternative, a right for water service from the Wind River Federal Irrigation Project based on state permits issued in 1905 to the United States or, for those lands outside the Project, for rights under state permits or certificates issued at varying times. The Court holds that these parties are not entitled to an 1868 priority date. Reservation reserved rights are rights created by the courts solely for the protection and enjoyment of Indian tribes so that they can make their reservations their homelands. (Decision of May 10, 1983, page 17) These rights do not pass to successors in interest to Indian lands. (Decision of May 10, 1983, pages 23-23.) Therefore, this Court will not award to non-Indian parties an 1868 priority date for their water rights.

The purpose of the third phase of this general adjudication is the consideration and review of the status in Division III of all state water permits, current and expired, and adjudicated certificates. It is proper that the claims under state law of the twenty-six parties be ruled upon by the Court at a later time in the proceedings with

other claimants who are similarly situated. To facilitate matters, where possible to do so, the Court has accepted findings of fact of the Special Master as amended by the Court for these claims but will defer ruling upon all issues except the "Walton Right" claims which are rejected by the Court. The record reflects corrections introduced and accepted at the September 28, 1984, hearing in Lander.

The claims of Landis Webber, Red Creek Cattle Company, Bertha Reed Jones and Grace Graboski (Claims 24, 25, 26) have been dismissed by the Special Master on the grounds that the holding in *Merrill v. Bishop*, 74 Wyo. 298, 287 P.2d 620 (1955) makes these claims *res judicata*.

It is generally stated that the doctrine of *res judicata* applies to repetitious suits involving the same cause of action whereby the parties to the suit and their privies are thereafter bound as to those facts and matters actually or necessarily adjudicated. *Bard Ranch Company v. Weber*, 557 P.2d 722, 727 (Wyo. 1976).

Res judicata was discussed by the Wyoming Supreme Court in *CLS v. CLJ, JME and CKE*, decided January 18, 1985. In that case, the court cited a 1972 Wyoming case and said:

> "'Res judicata is the term applied to the rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies; and, as to them, it constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action.' *Barrett v. Town of Guernsey, Wyo.*, 652 P.2d 397, 398 (1982)." (Slipsheet, page 1)

The first *Merrill v. Bishop* case, 69 Wyo. 45, 237 P.2d 186 (1951) involved an action based on tort on the part of officials. The question decided by the Wyoming Supreme Court was whether or not a demurrer filed to the

petition was properly sustained on account of defect of parties. The second *Merrill* case (1955, *supra*) involved the same state officials, although some names had changed, but it was a cause of action to enjoin water officials from interfering with water rights and closing head gates. Plaintiffs contended that their water rights originated under the Treaty of 1868 and that their priority dates were likewise 1868. The Court did not decide what should be the plaintiffs' priority dates although there was some discussion of the issue. It held only that the plaintiffs failed in their burden of proof to justify the granting of injunctive relief. At page 315 of *Merrill, supra*, the Supreme Court of Wyoming was frustrated by the failure of the plaintiffs to specify the acreage irrigated by them.

> "There was some testimony that the lands of some of the plaintiffs were irrigated by the Indians, but here was no testimony of the specific number of acres irrigated by any of them. Nor is there any testimony as to whether or not the white men enlarged the use thereof as required under the rule of United States v. Hibner, supra [27 F.2d 909 (D.C., Idaho)], assuming the holding in that case to apply herein. In short, there is no testimony which would have enabled the trial court to make an intelligent order of injunction."

Earlier in the same decision at page 315 the court recommended that uncertainty as to the plaintiffs' rights might be resolved as follows:

> "To settle the controversy herein, the Board of Control in cooperation with plaintiffs and others situated likewise, should proceed to determine the rights of the latter by proceedings similar to those taken in other cases."

Apparently proceedings subsequently took place before the Board of Control and adjudicated certificates contain-

ing a priority date of 1905 were prepared. See Supplemental and Final Report of Special Master Roncalio, June 1, 1984 at pages 47, 48, and 49. Now, after many years, claimants Landis Webber for Red Creek Cattle Company, Bertha Lee Jones and Grace Graboski seek to relitigate the decision of the Board of Control. Presumably if the plaintiffs or their predecessors in interest had wished to seek review of the administrative decisions, they could have proceeded in court. Thus, the issue here would appear to be whether the doctrine of *res judicata* applies to the administrative determination of the Board of Control, in awarding a 1905 priority to the adjudicated certificates, rather than a basis found in the decision of the Supreme Court in *Merrill, supra.* The application of *res judicata* to agency decisions has not been clear; however, at least since 1966 the trend appears to favor application of the doctrine. See, Davis, *Administrative Law Treatise,* Vol. 4, Second Edition, Section 21:2, at page 49. As reflected at page 51, the *Restatement of Judgments* now addresses this subject.

> "The second Restatement of Judgments does deal with that subject in § 83, which provides: '(1) Except as stated in Subsections (2), (3), and (4), a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions, as a judgment of a court.' "

Therefore, it appears that the present situation of Landis Webber, Bertha Lee Jones and Grace Graboski may be distinguishable from *Merrill, supra* on the basis that (1) this is a statutorily-authorized general adjudication of all rights to use water within the Big Horn River system and all other sources and (2) this action does not arise out of tort, nor is it a request for injunctive relief. Nevertheless, the prior administrative decision assigning a priority date to the adjudicated water right precludes further inquiry by the Court for these claimants.

The Court has already stated that non-Indian parties do not have an 1868 reserved right priority date for their water rights. However, as to other claims, not otherwise precluded, a non-Indian may be permitted to use evidence of a previous Indian owner's application of beneficial use to justify his claim under state law to a priority date relating back to the date of first use.

Non-Indians must obtain their water rights under color of state law. A non-Indian acquiring former Indian land is required by state law to make application for a state water permit within a reasonable time, but even if he does not do so, the first application of water for beneficial use would have to be the basis for determining a priority date. (Decision of May 10, 1983, pages 21-24)

The effect of *U.S. v. Hampleman* on the parties in this case has not yet been discussed. The Court can easily resolve the questions raised by *Hampleman* because that case deals only with Indian allottees, there were no conveyances to non-Indians, and, by the facts and the decree, the perpetual injunction doesn't extend to the State of Wyoming, but only applies to the defendant, Albert Hampleman, or his servants, agents and employees. Whether or not the case even addressed the claims of the State of Wyoming is unclear; apparently it did only insofar as the State claims were rejected to allow the injunction. Being an unpublished opinion, *U.S. v. Hampleman* is a weak prop for the theory that Indian allottees convey an 1868 reserved right priority date when land is sold to non-Indians. *U.S. v. Hampleman* and related issues raised by attorney Michael S. Messenger, have already been disposed of by Judge Joffe in his Decision of May 10, 1983:

> "The reserved rights doctrine is a(n) unique Indian right. It does not extend to subsequent purchasers of Indian land." (Page 21)
>
> "It is this Court's view that when Indian reservation land left Indian ownership or United States

Trust status, it lost its original reservation land status for purposes of a reserved water right priority date of 1868." (Page 23)

FINDINGS OF FACT

Upon review of the Report of the Special Master dated June 1, 1984, and upon Motion of the State of Wyoming and review of all objections and exceptions to the Report of the Special Master, Part I, the Court finds the following:

A. The Report of the Special Master, Part I, should be modified in accordance with the objections, exceptions and motions.

B. The Findings of Fact and Conclusions of Law set out on pages 50 and 51 of the Special Master's Report are modified to read as follows:

1. The United States has delivered water to the claimants identified in Claims 1 through 23, upon payment of assessments. Claimants listed in Claims 22 and 23 are not served by the Wind River Federal Irrigation Project.

2. The lands identified in Claims 1 through 26 are each described in applications and permits of record in the Office of the Wyoming State Engineer, and many of these lands have been adjudicated by the Wyoming Board of Control and are described in Certificates of Appropriation.

3. That portion of the report of the Special Master dated December 15, 1982, discussing alienability of reserved water rights, from page 44 through 55, is incorporated herein to the extent it is not inconsistent with the holdings of the Court in its Order dated June 8, 1984, and its Amended Judgment and Decree, regarding reacquired lands.

4. With respect to all Claims numbered 1 through 23, the Court finds that the identified land of each claimant:

A. Is within the Wind River Indian Reservation.

B. Had been regularly irrigated beginning with the date and for the periods mentioned in each claim discussed, and the water thereon put to beneficial use.

5. With respect to Claims 1 through 23, the claimants or their non-Indian predecessors purchased the claimed lands after permits were issued for irrigation of these lands by the Wyoming State Engineer in 1905 .

It is likely that the purchasers of the lands intended to irrigate the lands in accordance with the terms of the applicable permits.

Those claimants who use water from a Federal Irrigation Project are subject to those federal statutes, rules and regulations governing the administration of the project and nothing in these findings, conclusions or decree shall be construed to deprive any such claimant of any right granted or relieve him of any responsibility that is imposed, by federal statutes, rule, regulation, or amendment thereto, governing the administration of the project.

6. With respect to Claims 24, 25, and 26, the Court finds that while there may be evidence to support claims for priority dates predating existing priority dates on these adjudicated certificates, nevertheless, the issue of plaintiffs' priority dates has been finally determined by a competent tribunal.

7. The Findings of Fact for each claimant with respect to legal descriptions, acreage irrigated, sources of diversions, headgate locations, permit

numbers, priority dates, and names of each claimant are not set forth separately from this Order, but are incorporated in it.

8. The annual diversion requirements for the seven units of the Wind River Federal Irrigation Project were established for Indians and set out in the Special Master's Report on Phase I, and were adopted by the Court. The diversion rates as set out in the Finding of Fact and Conclusion of Law for each claim are based upon statutory provisions of one cubic foot per second for 70 acres. (W.S. § 41-4-101, § 44-4-317)

9. The Court finds that there was extensive public notice of these proceedings, and that all individuals who were parties to the litigation received personal notice of the hearings by the Special Master.

10. The Court finds that action by the Court at this time is not required for adjudicated certificates covering lands within Claims 1 through 23.

11. The Court finds that Parts II and III of the Special Master's Supplemental and Final Report are recommendations only. Adjudicated certificates, dated prior to January 1, 1977, should be confirmed subject to the stipulation dated April 15, 1980, of the State, the United States and the Tribes, permitting challenges of certain certificates in accordance with law. The Court has asked for proposals for orderly procedures governing future hearings and actions herein from other parties and anticipates taking action as further information is developed.

CONCLUSIONS OF LAW

A. Non-Indian purchasers of Indian land do not take a reserved water right with an 1868 Treaty priority date.

B. Non-Indian successors to allottees are entitled to water rights with priority dates established by permits

and/or certificates issued by the State of Wyoming, or by evidence of first application of water for beneficial use.

C. The holding in *U.S. v. Hampleman, supra,* is not relevant in this case.

D. *Merrill v. Bishop, supra,* is not *res judicata* as to Claims 24, 25, and 26; however relief for these claimants is precluded by the adjudication of the Board of Control, which established priority dates.

E. The most appropriate time for decision on the claims is at a later time in this case when all state water permits and certificates in Division III will be reviewed.

F. It is proper and expedient for the evidence in the record, as corrected, to be held for consideration by the Court in later proceedings.

NOW THEREFORE, BE IT ORDERED, DECREED AND ADJUDGED that:

I. The Court defers acceptance and ratification of the Special Master's Supplemental and Final Report, Part I as to Claims 1 through 23.

II. All claims by non-Indian successors to Indian lands for water rights with priority dates of July 3, 1868, are denied.

III. The priority dates on Claims 24, 25 and 26 shall be those determined by the Board of Control and reflected on the adjudicated certificates of these claimants.

IV. All adjudicated certificates, dated on or before January 1, 1977, are confirmed, subject to the stipulation dated April 15, 1980, by and between the Indian Tribes, the State of Wyoming, and the United States.

V. The Claims 1 through 23 identified in the Special Master's Report are considered as claims for reinstatement of permits for which the time for filing required

notice has expired, and such permits are hereby reinstated as described below, the findings of fact as set out below regarding these claims shall be made a part of the record, any claim for modification or adjustment of the findings of fact shall be handled later in these proceedings, and the reinstated permits are subject to final adjudication through procedures to be approved by further Order of this Court regarding unadjudicated permits and adjudicated certificates.

VI. Non-Indian successors to allottees are entitled to water rights with priority dates established by permits and/or certificates issued by the State of Wyoming, or by evidence of first application of water for beneficial use.

VII. Part IV of the Special Master's Supplemental and Final Report dated June 1, 1984, shall be further refined and procedures shall be established governing future proceedings.

VIII. Pursuant to Rule 54(b) W.R.C.P. the Court finds that there is no just reason for delay for entry of final judgment on the claims described herein, and therefore, ORDERS same.

Dated this 15th day of May, 1985.

/s/ Alan B. Johnson
ALAN B. JOHNSON
District Judge

[Certificate Omitted in Printing]

CLAIM NO. 1

CLAIMANT: RUDY AND NANCY ZUPENCE

Box 333, Ft. Washakie, Wyoming 82514

Permit No. 6633 and 9080

Acres Claimed: 50

Acres Reinstated: 25.4

Diversion Rate (C.F.S.): 0.71

Diversion Structure: Ray Canal

Headgate Location: T1S R1W, Section 22

Water Source: South Fork Little Wind River

Priority Date: March 18, 1905

Township 1 South, Range 1 West of the W.R.M.:

Section 5: NE/4 SW/4, N/2 SE/4 SW/4, W/2 SE/4 SE/4 SW/4

CLAIM NO. 2

CLAIMANT: ALBERT HORNECKER

Route 61, Ethete, Wyoming

Permit No. 6633 and 9080, partial coverage

Acres Claimed: 420.97

Acres Reinstated: 108.16

Diversion Rate (C.F.S.): 1.55

Diversion Structure: Ray Canal

Headgate Location: T1S R1W, Section 22

Water Source: South Fork Little Wind River

Priority Date: March 18, 1905

Township 1 South, Range 1 East of the W.R.M.:

	Parcel and Land Description		Reinstated Acreage
D-1:	Section 21:	SW/4 SW/4	38.85
D-2:	Section 27:	N/2 NW/4	0.00
D-3:	Section 28:	N/2 SE/4	0.00
D-4:	Section 28:	SW/4 SE/4, SE/4 SW/4	2.00
D-5:	Section 29:	SE/4 SW/4	31.70
D-6:	Section 32:	NW/4 NE/4	35.61
		Totals	108.16

CLAIM NO. 3

CLAIMANT: CHARLES M. ROEMER

Box 563, Lander, Wyoming 82520

Permit No. 6633 and 9080

Acres Claimed: 53

Acres Reinstated: 25

Diversion Rate (C.F.S.): 0.36

Diversion Structure: Ray Canal

Headgate Location: T1S R1W, Section 22

Water Source: South Fork Little Wind River

Priority Date: March 18, 1905

Township 1 South, Range 1 West of the W.R.M.: Section 5: S/2 NW/4 SE/4, NW/4 NW/4 SE/4, SW/4 SE/4

CLAIM NO. 4

CLAIMANT: HOMER BLOMBERG, SR.

P.O. Box 229, Riverton, Wyoming 82501

Permit No. 6634

Acres Claimed: 15.47

Acres Reinstated: 15.47

Diversion Rate (C.F.S.): 0.21

Diversion Structure: Left Hand Canal

Headgate Location: T1N R3E, Section 28

Water Source: Main Stem Wind River

Priority Date: March 18, 1905

Township 1 South, Range 4 East of the W.R.M.: Section 10: E/2 NW/4 NW/4

CLAIM NO. 5

CLAIMANT: KENNETH AND GLADYS HANSEN

Box 55 Star Route, Arapahoe, Wyoming 82510

Permit No. 6632

Total Acres Claimed: 152

Acres Reinstated: 81

Diversion Rate (C.F.S.): 1.16

Diversion Structure: Coolidge Canal

Headgate Location: T1N R1W, Section 36

Water Source: Main Stem Little Wind River

Priority Date: March 18, 1905

C-1: *Township 1 South, Range 1 East of the W.R.M.*:

Section 1: E/2 SE/4
Acres Claimed: 42
Acres Reinstated: 42

C-2: *Township 1 South, Range 1 East of the W.R.M.*:

Section 11: W/2 NW/4
Acres Claimed: 71
Acres Reinstated: 0
[Covered by adjudicated certificate of appropriation, Proof No. 18419 (Book 6, p. 392) Priority March 18, 1905]

C-3: *Township 1 South, Range 1 East of the W.R.M.*:

Section 12: NW/4 NE/4
Acres Claimed: 39
Acres Reinstated: 39

CLAIM NO. 6

CLAIMANT: JAMES NIRIDER

Box 62, Arapahoe, Wyoming 82501

Permit No. 6632

Total Acres Claimed: 248.46

Acres Reinstated: 176.46

Diversion Rate (C.F.S.): 2.52

Diversion Structure: Coolidge Canal

Headgate Location: T1N R1W, Section 36

Water Source: Main Stem Little Wind River

Priority Date: March 18, 1905

F-1: *Township 1 South, Range 1 East of the W.R.M.*:

Section 2: E/2 SE/4, SE/2 NE/4
Acres Claimed: 97.3
Acres Reinstated: 97.3

F-2: *Township 1 South, Range 2 East of the W.R.M.*:

Section 7: SE/4 NW/4, Lot 2
Acres Claimed: 79.16
Acres Reinstated: 79.16

F-3: *Township 1 North, Range 1 East of the W.R.M.*:

Section 35: E/2 SE/4
Acres Claimed: 72.0
Acres Reinstated: .0
[Adjudicated, Permit No. 6632, Proof No. 18570, Priority Date March 18, 1905]

CLAIM NO. 7

CLAIMANT: THOMAS REED

P.O. Box 45, Lander, Wyoming 82520

Permit No. 6632

Total Acres Claimed: 170

Acres Reinstated: 59.4

Diversion Rate (C.F.S.): 0.85

Diversion Structure: Coolidge Canal

Headgate Location: T1N R1W, Section 36

Water Source: Main Stem Little Wind River

Priority Date: March 18, 1905

G-1: *Township 1 South, Range 1 East of the W.R.M.*:

Section 15: S/2 NW/4
Acres Claimed: 55
Acres Reinstated: 0
Adjudicated Certificate

G-2: *Township 1 South, Range 1 East of the W.R.M.*:

Section 22: S/2 NE/4
Acres Claimed: 60
Acres Reinstated: 4.4

G-3: *Township 1 South, Range 1 East of the W.R.M.*:

Section 22: N/2 NW/4
Acres Claimed: 55
Acres Reinstated: 55

CLAIM NO. 8

CLAIMANT: DONALD BATH;
DHB & CO., and PLB & CO.

Star Route, Box 95, Arapahoe, Wyoming 82510

Permit No. 6582 and 6630

Total Acres Claimed: 492.95

Acres Reinstated: 131.80

Diversion Rate (C.F.S.): 2.20

Diversion Structure: Subagency Canal

Headgate Location: T1S R2E, Section 10

Water Source: Main Stem Little Wind River

Priority Date: May 5, 1905

B-1: *Township 1 South, Range 3 East of the W.R.M.*:

Section 13: E/2 NW/4
Acres Claimed: 78.1
Acres Reinstated: 0.0
Adjudicated, Permit No. 6582, Proof No. 19290 (Book 6, p. 680),
Priority date: May 5, 1905

B-2: *Township 1 South, Range 3 East of the W.R.M.*:

Section 14: E/2 NW/4
Acres Claimed: 78.85
Acres Reinstated: 0.0
Adjudicated, Permit No. 6582, Proof No. 23468 (Book 11, p. 54)
Priority date: May 5, 1905

B-3: *Township 1 South, Range 3 East of the W.R.M.*:

Section 14: SW/4 NE/4 and NW/4 SE/4
Acres Claimed: 74.2
Acres Reinstated: 0.0

Adjudicated, Permit No. 6582, Proof No. 23468 (Book 11, p. 54)
Priority date: May 5, 1905

B-4: *Township 1 South, Range 3 East of the W.R.M.*:

Section 14: SE/4 NE/4 and NE/4 SE/4
Acres Claimed: 69.3
Acres Reinstated: 69.3

B-5: *Township 1 South, Range 3 East of the W.R.M.*:

Section 15: N/2 NE/4
Acres Claimed: 74.25
Acres Reinstated: 0.0
Adjudicated, Permit No. 6582, Proof No. 23468 (Book 11, p. 54)
Priority date: May 5, 1905

B-6: *Township 1 South, Range 3 East of the W.R.M.*:

Section 16: SE/4 SE/4 (33.25 acres)
Section 21: E/2NE/4 (25.00 acres)
Acres Claimed: 58.25
Acres Reinstated: 25.00

B-7: *Township 1 South, Range 3 East of the W.R.M.*:

Section 22: NW/4
Acres Claimed: 60
Acres Reinstated: 37.5

CLAIM NO. 9

CLAIMANT: BRADFORD BATH

Star Route, Box 95, Arapahoe, Wyoming 82510

Permit No. 6582 and 6630

Total Acres Claimed: 79.0

Acres Reinstated: 75.9

Diversion Rate (C.F.S.): 1.13

Diversion Structure: Subagency Canal

Headgate Location: T1S R2E, Section 10

Water Source: Main Stem Little Wind River

Priority Date: May 5, 1905

A-1: *Township 1 South, Range 3 East of the W.R.M.*:

Section 14: W/2 SW/4 (except 2.76 acres)
Acres Claimed: 79.0
Acres Reinstated: 79.0

CLAIM NO. 10

CLAIMANT: ARTHUR AND WANDA LUCAS

Box 22, Star Route, Arapahoe, Wyoming 82510

Permit No. 6582 and 6630

Total Acres Claimed: 31

Acres Reinstated: 12

Diversion Rate (C.F.S.): 0.17

Diversion Structure: Subagency Canal

Headgate Location: T1S R2E, Section 10

Water Source: Main Stem Little Wind River

Priority Date: May 5, 1905

O-1: *Township 1 South, Range 3 East of the W.R.M.*:

Section 17: SW/4 SE/4
Acres Claimed: 19
Acres Reinstated: 0
Adjudicated Permit No. 6582, Proof No. 18412 (Book 6, p. 392)
Priority Date: May 5, 1905

O-2: *Township 1 South, Range 3 East of the W.R.M.*:

Section 20: Westerly 990' of E/2 NE/4
Acres Claimed: 12
Acres Reinstated: 12

CLAIM NO. 11

CLAIMANT: HENRY AND VIOLET LEWIS

Arapahoe Route, Box 3060, Riverton, Wyoming 82510

Permit No. 6582 and 6630

Total Acres Claimed: 62

Acres Reinstated: 62

Diversion Rate (C.F.S.): 0.89

Diversion Structure: Subagency Canal

Headgate Location: T1S R2E, Section 10

Water Source: Main Stem Little Wind River

Priority Date: May 5, 1905

N-1 *Township 1 South, Range 3 East of the W.R.M.*:

Section 12: E/2 SE/4
Acres Claimed: 62
Acres Reinstated: 62

CLAIM NO. 12

CLAIMANT: GRIFFIN BROTHERS, INCORPORATED

by HERSCHEL GRIFFIN

Box 322, Riverton, Wyoming 82501

TOTAL

Total Acres Claimed: 456

Acres Reinstated: 15

LEFT HAND CANAL

Permit No. 6634

Total Acres Claimed: 15

Acres Reinstated: 13.4

Diversion Rate (C.F.S.): 0.21

Diversion Structure: Left Hand Canal

Headgate Location: T1N R3E, Section 28

Water Source: Main Stem Wind River

Priority Date: March 18, 1905

P-1: *Township 1 South, Range 3 East of the W.R.M.*:

Section 1: S/2 of Lot 1, SE/4 NE/4, N/2 NE/4 SE/4
Acres Claimed: 5
Acres Reinstated: Both Tracts (P-1 and P-2)-13.4

P-2: *Township 1 South, Range 3 East of the W.R.M.*:

Section 1: SW/4 NE/4, N/2 NW/4 SE/4, S/2 of Lot 2 (NW/4 NE/4)
Acres Claimed: 10
Acres Reinstated: Both tracts (P-1 & P-2)-13.4

SUBAGENCY CANAL

Permit No. 6582

Total Acres Claimed: 85

Acres Reinstated: 0

Diversion Structure: Subagency Canal

Headgate Location: T1S R2E, Section 10

Water Sources: Main Stem Little Wind River

Priority Date: May 5, 1905

P-3: *Township 1 South, Range 4 East of the W.R.M.*:

Section 7: Lot 1 (NW/4 NW/4), NE/4 NW/4, NW/4 NE/4
Acres Claimed: 85
Acres Reinstated: 0
Adjudicated, Permit No. 6582, Proof No. 18411 (Book 6, p. 391)
Priority Date: May 5, 1905

DOUBLE DITCH

Permit No.

Total acres Claimed: 356

Acres Reinstated: 0

Diversion Rate (C.F.S.): 0

Diversion Structure: Double Ditch

Headgate Location: T1S R3E, Section 23

Water Source: Main Stem Little Wind River

P-4: *Township 1 South, Range 4 East of the W.R.M.*:

Section 16: Lot 3 (SW/4 NW/4), W/2 SW/4
Section 17: Lot 2, Lot 3, E/2 SE/4
Acres Claimed: 170
Acres Reinstated: 0

P-5: *Township 1 South, Range 4 East of the W.R.M.*:

Section 17: NE/4 SW/4, NW/4 SE/4
Acres Claimed: 61
Acres Reinstated: 0

P-6: *Township 1 South, Range 4 East of the W.R.M.*:

Section 17: SW/4 SE/4
Section 20: NW/4 NE/4
Acres Claimed: 30
Acres Reinstated: 0

P-7: *Township 1 South, Range 4 East of the W.R.M.*:

Section 19: SE/4 NW/4, SW/4 NE/4, NW/4 SE/4, NE/4 SW/4
Acres Claimed: 95
Acres Reinstated: 0

These tracts are covered by Adjudicated Certificates.

CLAIM NO. 13

CLAIMANT: DON VAN RIPER

Ruote 61, Box 63, Lander, Wyoming 82601

Permit No. 6632

Total Acres Claimed: 54

Acres Reinstated: 23.0

Diversion Rate (C.F.S.): 0.77

Diversion Structure: Coolidge Canal

Headgate Location: T1N R1W, Section 36

Water Source: Main Stem Little Wind River

Priority Date: March 18, 1905

K-1: *Township 1 South, Range 2 East of the W.R.M.*:

Section 6: Lot 4 (NW/4 NW/4)
Lot 5 (SW/4 NW/4)

CLAIM NO. 14

CLAIMANT: RALPH AND EILEEN URBIGKIT

Crowheart, Wyoming 82512

TOTAL

Total Acres Claimed: 325.7

Acres Reinstated: 317.0

WIND RIVER "A" CANAL

Permit No. 6614 and 6625

Total Acres Claimed: 127.7

Acres Reinstated: 127.7

Diversion Rate (C.F.S.): 1.82

Diversion Structure: Wind River "A" Canal

Headgate Location: T5N R5W, Section 14

Water Source: Main Stem Wind River

Priority Date: April 27, 1905

I-1: *Township 4 North, Range 4 West of the W.R.M.*:

Section 2: E/2 SW/4

I-2: *Township 4 North, Range 4 West of the W.R.M.*:

Section 2: SW/4 SW/4
Acres Claimed, both I-1 and I-2: 96.3
Acres Reinstated, both I-1 and I-2: 96.3

I-3: *Township 4 North, Range 4 West of the W.R.M.*:

Section 2: SW/4 NW/4

I-4: *Township 4 North, Range 4 West of the W.R.M.*:

Section 2: SE/4 NW/4
Acres Claimed, both I-3 and I-4: 31.4
Acres Reinstated, both I-3 and I-4: 31.4

DRY CREEK BENCH CANAL

Permit No. 6626

Total Acres Claimed: 198.0

Acres Reinstated: 198.0

Diversion Rate (C.F.S.): 2.83

Diversion Structure: Dry Creek Bench Canal

Headgate Location: T4N R4W, Section 6

Water Source: Dinwoody Creek

Priority Date: April 27, 1905

I-5: *Township 4 North, Range 4 West of the W.R.M.*:

Section 16: S/2 NE/4, SE/4 NW4
Acres Claimed: 94
Acres Reinstated: 94

I-6: *Township 4 North, Range 4 West of the W.R.M.*:

Section 16: N/2 SE/4, NE/4 SW/4
Acres Claimed: 104
Acres Reinstated: 104

CLAIM NO. 15

CLAIMANT: DALE AND PATRICIA URBIGKIT

Permit No. 6626

Total Acres Claimed: 265

Acres Reinstated: 200

Diversion Rate (C.F.S.): 2.86

Diversion Structure: Dry Creek Bench Canal

Headgate Location: T4N R4W, Section 6

Water Source: Dinwoody Creek

Priority Date: April 27, 1905

H-1: *Township 4 North, Range 4 West of the W.R.M.*:

Section 4: SW/4 NE/4, NW/4 SE/4, Lot 6
Acres Claimed: 65
Acres Reinstated: 0
Adjudicated

H-2: *Township 4 North, Range 4 West of the W.R.M.*:

Section 4: SW/4, S/2 NW/4, S/2 of Lot 3, S/2 of Lot 4
Acres Claimed: 200
Acres Reinstated: 200

CLAIM NO. 16

CLAIMANT: RALPH FLOYD URBIGKIT

Crowheart: Wyoming 82512

Permit No. 6625 and 6626

Total Acres Claimed: 259.60

Acres Reinstated: 153.85

Division Rate (C.F.S.): 2.20

Diversion Structure: Wind River "A" Canal

Headgate Location: T5N R5W, Section 14

Water Source: Main Stem Wind River

Priority Date: April 27, 1905

J-1: *Township 4 North, Range 4 West of the W.R.M.*:

Section 11: SE/4, SE/4 NE/4
Acres Claimed: 153.85
Acres Reinstated: 153.85

J-2: *Township 4 North, Range 4 West of the W.R.M.*:

Section 15: NW/4 NE/4, N/2 NW/4
Acres Claimed: 105.75
Acres Reinstated: 0.0
Adjudicated

CLAIM NO. 17

CLAIMANT: JOHN (JR.) AND BARBARA LONGFELLOW

Box 46, Star Route Arapahoe, Wyoming 82510

Permit No. 6603 and 6632

Total Acres Claimed: 225

Acres Reinstated: 211

Diversion Rate (C.F.S.): 3.21

Diversion Structure: Coolidge Canal

Headgate Location: T1N R1W, Section 36

Water Source: Main Stem Little Wind River

Priority Date: March 18, 1905

Township 1 South, Range 2 East of the W.R.M.:

Section 8: NE/4 NE/4
Section 9: W/2 NW/4, NE/4 NE/4
Section 16: SW/4 SW/4
Section 17: SE/4 SE/4
Acres Claimed: 240 (225 net)
Acres Reinstated: 211

CLAIM NO. 18

CLAIMANT: VERL SNEED AND
HOMER BLOMBERG, JR.

by ANNA MERLE BLOMBERG

P.O. Box 229, Riverton, Wyoming 82510

Permit No. 6634

Total Acres claimed: 35

Acres Reinstated: 0

Diversion Structure: Left Hand Canal

Headgate Location: T1N R3E, Section 28

Water Source: Main Stem Wind River

Priority Date: May 5, 1905

Township 1 South, Range 4 East of the W.R.M.:

Section 9: NE/4 NE/4
Adjudicated, Permit No. 6634, Proof No. 22728 (Book 10, p. 280)
Priority Date: May 5, 1905

CLAIM NO. 19

CLAIMANT: KATHRYN LINDEN DICKINSON

Route 2, Box 555, Riverton, Wyoming 82510

Permit No. 6582 and 6630

Total Acres Claimed: 16

Acres Reinstated: 16

Diversion Rate (C.F.S.): 0.23

Diversion Structure: Subagency Canal

Headgate Location: T1S R2E, Section 10

Water Source: Main Stem Little Wind River

Priority Date: May 5, 1905

Township 1 South, Range 3 East of the W.R.M.:

Section 17: SE/4 SE/4

CLAIM NO. 20

CLAIMANT: KENNETH AND PATRICIA PERSSON

680 Bonnie Brae, Lander, Wyoming 82520

Permit No. 6633 and 9080

Total Acres Claimed: 100

Acres Reinstated: 0

Diversion Structure: Ray Canal

Headgate Location: T1S R1W, Section 22

Water Source: South Fork Little Wind River

Priority Date: March 18, 1905

Township 1 South, Range 1 West of the W.R.M.:

Section 25: W/2 SE/4
Adjudicated, Permits No. 9080 and 6633, Proof No. 18592 (Book 6, p. 463)
Priority Date: March 18, 1905
Section 25: E/2 SW/4
Adjudicated, Permits No. 9080 and 6633, Proof No. 18586 (Book 6, 463)
Priority Date: March 18, 1905

CLAIM NO. 21

CLAIMANT: CHARLES RICHARDSON

Arizona

Permit No. 11240

Total Acres Claimed: 60

Acres Reinstated: 60

Diversion Rate (C.F.S.): 0.86

Diversion Structure: Dry Creek Bench Canal

Headgate Location: T4N R4W, Section 6

Water Source: Dinwoody Creek

Priority Date: April 27, 1905

R-1: *Township 4 North, Range 3 West, of the W.R.M.:*

Section 28: SE/4 SW/4, Lot 6 (NW/4 SW/4), Lot 11 (SE/4 NW/4)

Section 33: N/2 NE/4 NW/4

CLAIM NO. 22

CLAIMANT: DR. AND MRS. RICHARD D. MARTIN

Box 637, Crowheart, Wyoming 82512

Permit No. 15864

Total Acres Claimed: 80

Acres Reinstated: 63.6

Diversion Rate (C.F.S.): 0.77

Diversion Structure: North Fork Meadow Creek No. 2

Headgate Location: T4N R4W, Section 33

Water Source: Meadow Creek

Priority Date: September 27, 1920

E-1: *Township 4 North, Range 5 West, of the W.R.M.:*

Section 36: W/2 NW/4 and NW/4 SW/4

CLAIM NO. 23

CLAIMANT: ROBERTA PERALTA

Red Creek Ranch, Crowheart, Wyoming 82512

Permit No. 17855 and 18073

Total Acres Claimed: 456

Acres Reinstated: 57

Diversion Rate (C.F.S.): 0.81

Diversion Structure: Millers Red Creek

Headgate Location: T5N R6W, Section 13

Water Source: Red Creek, Tributary to Big Wind River

Township 5 North, Range 5 West of the W.R.M.:

Section 7: SE/4 SE/4, Lot 6, NE/4 SE/4
Acres Claimed: 85.25
Acres Irrigated: 47
Acres Reinstated: 0
Adjudicated, Permit No. 14623, Proof No. 18405,
(Book 6, p. 391)
Priority Date: February 3, 1917

Section 7: Lot 10 (NW/4 SW/4), Lot 11 (SW/4 NW/4)
Acres Claimed: 0
Acres Reinstated: 0

Section 7: SW/4 SE/4
Acres Claimed: 28
Acres Reinstated: 28
Permit No. 18073, Priority Date April 21, 1932

Section 7: Lot 8 (NE/4 SW/4) SE/4 SW/4,
Lot 7 (NE/4 SE/4)

Acres Claimed: 24
Acres Irrigated: 24
Acres Reinstated: 21

Three acres of SE/4 SW/4—Adjudicated. Permit No. 17849, Proof No. 25490) Book 13, p. 263) Priority date March 2, 1931

All other acres—Permit No. 17855, Priority Date March 2, 1931

Section 8: Lot 6, NW/4 SW/4, SW/4 SW/4
Acres Claimed: 72.87
Acres Irrigated: 30
Acres Irrigated: 0
Adjudicated, Permit No. 14623, Proof No. 18405, (Book 6, p. 391)
Priority Date: February 3, 1917

Section 18: Lot 1 (NW/4 NW/4), Lot 2, NE/4 NW/4
Acres Claimed: 48
Acres Irrigated: 48
Acres Reinstated: 8

19 acres of Lot 1 and 21 acres of NE/4 NW/4, a total of 40 acres—Adjudicated, Permit No. 17849, Proof No. 25490 (Book 13, Page 263).
Priority Date: March 2, 1931

All other acres: Permit No. 17855, Priority date—March 2, 1931

CLAIM NO. 24

Claimant: LANDIS WEBBER
for RED CREEK CATTLE COMPANY
Wyoming

Total Acres Claimed: 274

Acres Reinstated: None

Township 8 North, Range 2 East of the W.R.M.:

Section 5: Lot 2 (NW/4 NE/4)
Lot 3 SE/4 NW/4

CLAIM NO. 24

CLAIMANT: BERTHA LEE JONES

Wyoming

Total Acres Claimed: 240

Acres Reinstated: None

Township 9 North, Range 2 East of the W.R.M.:

Section 35: SE/4 NW/4, Lot (NE/4 NW/4), W/2 SE/4, W/2 NE/4

CLAIM NO. 26

CLAIMANT: GRACE GRABOSKI

Wyoming

Total Acres Claimed: 200

Acres Reinstated: None

Township 9 North, Range 2 East of the W.R.M.:
Section 35: Lot 3 (SE/4, NW/4), W/2 SW/4, E/2 SW/4

APPENDIX C-1

IN THE SUPREME COURT
STATE OF WYOMING

Case No. 85-203, 85-204, 85-205,
85-217, 85-218, 85-225, 85-226

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, WATER DIVISION NO. 3, STATE OF WYOMING

[Filed Oct. 30, 1985]

ORDER ON APPEAL PROCEDURES

Having considered the major parties' Joint Motion on Appeal Procedures and in reliance on the representations made therein, the motion being well taken by the Court, it is Ordered pursuant to W.R.A.P. 16:

---

1. *Categories of Claims.*

   a. The claims, for the purposes of this appeal, shall be categorized as follows:

      1. *Type 1.* Reserved water right claims made by the United States and the Tribes quantified on the basis of Practicably Irrigable Acres (appeals from Amended Judgment and Decree, dated May 15, 1985, and filed on May 24, 1985).

2. *Type 2.* Other reserved water right issues including, but not limited to, administration, groundwater and claims other than those quantified on the basis of Practicably Irrigable Acres, also made by the United States and Tribes (appeals from Amended Judgment and Decree, dated May 15, 1985, and filed on May 24, 1985).

3. *Type 3.* Water right claims made by private parties, asserting rights as successors in interest to individual Indians (appeals from Order, Denying Treaty Priority Date Modifying and Correcting Findings of Fact and Conclusions of Law, Ruling on Certain Specified Claims, and Deferring Acceptance of Recommended Final Decree in the Special Master's Supplemental and Final Report, dated May 15, 1985, and filed on May 24, 1985).

b. Each party shall appear through separate briefs and oral argument with respect to each type of claim.

2. *Briefs and Appendices.* Briefs and appendices shall conform to W.R.A.P. 5.05 and 5.06, except as set forth below:

a. Briefs for issues raised by Type 1 and briefs for issues raised by Type 2 claims.

(1) Length:

(a) Principal briefs shall not exceed 145 printed pages by letter press or 200 pages by any other process of duplicating and copying.

(b) Reply briefs shall not exceed 75 printed pages by letter press or 100 pages by any other process of duplicating or copying.

(2) Time:

The following briefing schedule is established for each of the above three types of claims:

(a) Appellants shall file and serve briefs on or before December 2, 1985.

(b) Appellees shall file briefs on or before February 3, 1986.

(c) Reply briefs shall be filed on or before March 5, 1986.

(3) Service of the full text of all briefs among the major parties and upon all parties appearing as appellants or appellees shall be by commercial courier, e.g. Federal Express.

(4) With respect to appellants' opening briefs, only the cover and the Statement of the Issues from said briefs need be served on all other parties by first class mail. Inserted in the mailing shall be a written notice that the full text of said brief may be obtained, at the briefing party's expense, by written or telephonic request to the briefing party.

b. Addenda or appendices shall be liberally utilized to bring to the attention of the Court portions of the record, statutes, legislative histories, rules and regulations, administrative materials, etc., or summary thereof. On or before April 1, 1986, the major parties shall prepare Joint Appendices in bound volumes, containing all documents referred to in said briefs. Thereafter, on or before April 25, 1986, the major parties shall resubmit their briefs, amended only by the insertion of specific references to the Joint Appendices. This

provision shall not preclude the major parties or other parties from including separate appendices with their individual briefs, should that appear to be appropriate.

3. *Oral Arguments.* The provisions of W.R.A.P. 6 shall apply to oral arguments herein, except as set forth below:

   a. Separate settings shall be made for the oral arguments on each of the three types of claims set forth above. In order to minimize redundancy in oral arguments, arguments on Type 1 claims shall be set to be made first, followed by arguments on Type 2 and Type 3 claims, in that order.

   b. Time:

      (1) With respect to the oral arguments on Type 1 and the oral arguments on Type 2 claims, counsel on each side shall occupy not more than 60 minutes in the argument. Counsel shall be responsible for division of arguments when more than one party desires to appear as appellant or appellee on a particular type of claim.

      (2) With respect to Type 3 claims, counsel on each side shall occupy not more than 30 minutes in the argument.

4. *Record.* In keeping with the trial court's Order Defining, Correcting and Authorizing Supplementation and Retention of the Record, entered September 16, 1985:

   The Clerk of the District Court shall retain custody of the complete record (other than the papers to be delivered to the Clerk of the Supreme Court) at the fourth floor vault of the Barrett Building in Cheyenne until such time

as the parties have filed all briefs and prepared a joint appendix and the Clerk is notified by a party appellant that the record should be transmitted, or at such time as this Court or the District Court shall order transmission of the record.

SO ORDERED this 30th day of October, 1985.

/s/ Richard V. Thomas
Chief Justice

APPENDIX D

IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT
STATE OF WYOMING, COUNTY OF LARAMIE

Docket No. 101-234

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING.

[Filed May 24, 1985]

AMENDED JUDGMENT AND DECREE

THIS MATTER having come before the Court on assignment from the Honorable Harold Joffe, District Judge, Retired, and the Court having reviewed the Report of the Honorable Teno Roncalio, Special Master, dated December 15, 1982, and the Court having reviewed the Findings of Fact and Conclusions of Law, Judgment and Decree of Judge Joffe, dated May 10, 1983, and the Court having heard the motions of the parties to amend the Findings and Judgment on July 14, 1983, and November 15, 1983, and the Court having accepted Stipulations A, B, C, D, and E and Owl Creek Basin, tendered by the parties on November 15, 1983, and being fully advised in the premises, the Court finds as follows:

1. The Order Ruling on Motions to Alter or Amend the Decision of May 10, 1983, filed June 8, 1984, should be amended to read:

"State of Wyoming Motion to Amend Paragraph 3 of the Judgment and Decree: b. To provide that the priority dates for reacquired lands are those dates when each tract was reacquired.

"After consideration of the arguments submitted by the parties the Court will amend the decision of Judge Joffe, holding that the priority date of reacquired acreage owned by Indians in fee or by the United States in trust for the Tribes shall be the earlier date of the applicable state water permit or, the date land left Indian ownership and was purchased by a non-Indian or, the date of first application of water for beneficial use.

"The date of the applicable state water permit shall be the date as identified as 'water right date' set out in Exhibits A, B, C, and D, entered into the record on November 15, 1983, and to which the major parties have stipulated."

2. Findings of Fact number 98, and Conclusions of Law number 9 are deleted from the Decision of May 10, 1983, and Conclusions of law numbers 6 and 13 in the Decision of May 10, 1983, are amended to conform to the Court's later rulings.

3. All other Findings of Fact and Conclusions of Law contained in the Decision of May 10, 1983, are hereby incorporated by reference and made a part of this Amended Judgment and Decree.

AMENDED JUDGMENT AND DECREE

NOW THEREFORE, based on the Findings of Fact and Conclusions of Law as set out above, the Court approves and ADOPTS the Special Master's Report, except as inconsistent with this Decision; IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The United States has reserved, by virtue of the Treaty of Fort Bridger, July 3, 1868, and for the benefit of the Shoshone and Arapahoe Tribes of the Wind River

Indian Reservation, the right to divert water, or to have water diverted, in the amounts set forth hereby and from the streams set forth herein, and that said right has a priority date of July 3, 1868.

Description/Source	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
PROJECT LANDS—HISTORIC		
WIND RIVER FEDERAL IRRIGATION PROJECT		
Little Wind Unit:		
Ray Canal	8,242	38,303
Coolidge Canal	6,173	26,815
Sub Agency Canal	2,993	13,901
Subtotal	17,408	79,019
Upper Wind Unit:		
Wind River "A" Canal	972	9,555
Dinwoody Canal	5,759	54,235
Subtotal	6,731	63,790
Johnstown Unit:	603	3,461
Lefthand Unit:	1,205	7,267
MIDVALE IRRIGATION DISTRICT:	748	3,627
RIVERTON-LECLAIR IRRIGATION DISTRICT	1,065	5,112
PROJECT LANDS SUBTOTAL	27,760	162,276
NON-PROJECT LANDS—HISTORIC (including awarded Indian-owned fee lands)		
WIND RIVER BASIN		
East Fork Wind River	10	42
Dinwoody Creek	148	704
Sand Draw	0	0
Dry Creek	69	332
Bull Lake Creek	33	159
Meadow Creek	333	1,540
Dry Pasup Creek	82	365

Description/Source	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
Crow Creek	73	339
Willow Creek	0	0
Main Stem Wind River	1,091	5,330
Subtotal	1,839	8,811
PROJECT LANDS—HISTORIC		
LITTLE WIND RIVER BASIN		
North Fork Little Wind River	1,656	7,555
South Fork Little Wind River	625	2,792
Main Stem Little Wind River	1,085	5,632
Mil Creek	1	5
Sage Creek	1,644	8,064
Crooked Creek	69	317
Trout Creek	228	1,085
Spring Creek	178	769
Bighorn Draw	139	603
Subtotal	5,625	26,822
BIG HORN RIVER BASIN		
Main Stem Bighorn River	11	58
Cottonwood Creek	162	834
Fivemile Creek	267	1,293
Muddy Creek	1,025	5,024
Dry Muddy Creek	0	0
Maverick Springs Draw	0	0
Roundup or Warm Springs	0	0
Subtotal	1,465	7,209
POPO AGIE RIVER BASIN		
North Fork Popo Agie River	265	1,251
Main Stem Popo Agie River	36	180
Subtotal	301	1,431

Description/Source	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
OWL CREEK BASIN		
South Fork Owl Creek	278	1,015
Main Stem Owl Creek	0	0
Mud Creek	7	33
Red Creek	9	44
Subtotal	294	1,092
NON-PROJECT LANDS SUBTOTAL	9,524	45,365
PROJECT LANDS SUBTOTAL	27,760	162,276
TOTAL HISTORIC PROJECT AND NON-PROJECT LANDS	37,284	207,641

2. The United States has reserved, by virtue of the Treaty of Fort Bridger, July 3, 1868, and for the benefit of the Shoshone and Arapahoe Tribes of the Wind River Reservation, the right to divert water, or to have water diverted, in the amounts set forth herein, for the five awarded future projects. The said right has a priority date of July 3, 1868.

Future Projects	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
North Crowheart	34,993	133,324
South Crowheart	4,238	18,181
Arapahoe	3,437	15,088
Riverton East	3,019	13,890
Big Horn Flats	2,410	6,507
TOTAL FUTURE PROJECTS	48,097	186,990

3. In addition to the rights set out in paragraphs (1) and (2) above, the United States has reserved, by virtue of the Treaty of Fort Bridger, July 3, 1868, and for the

benefit of the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation, the right to divert water, or to have water diverted, in the amounts set forth herein.

The priority dates shall be the earlier: When the land left Indian ownership and was purchased by a non-Indian or, the date of the applicable state water permit or, the date of first application of water for beneficial use.

Shown below are priority dates representing the dates stipulated by the parties as the earlier of the date when reacquired land left Indian ownership and was purchased by a non-Indian or the date of an applicable state water permit for that land.

In the event a determination needs to be made based on a date of earlier beneficial use, the parties may submit evidence as to beneficial use at a later stage in the case when other claims of this nature will be considered by the Court and pursuant to the direction of the Court.

Description/Source	Priority Date	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
PROJECT LANDS—HISTORIC (including awarded Indian-owned fee lands)			
WIND RIVER FEDERAL IRRIGATION PROJECT:			
Little Wind Unit:			
Ray Canal	03/18/1905	931	4,352
	04/19/1918	3	14
	05/19/1919	17	80
	01/28/1955	11	54
	02/12/1969	8	38
	10/14/1969	50	239
Subtotal		1,020	4,777
Coolidge Canal	03/18/1905	506	2,350
	07/11/1910	71	305
	01/20/1920	80	346
	05/15/1924	63	274
Subtotal		720	3,275

Description/Source	Priority Date	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
Sub Agency Canal	05/05/1905	52	243
Little Wind Unit Total		1,792	8,295
Upper Wind Unit:			
Wind River "A"	04/27/1905	205	1,128
Dinwoody Canal	04/27/1905	1,260	8,485
	04/24/1911	6	63
	10/05/1916	10	106
	03/30/1917	7	69
	08/25/1917	4	38
	01/12/1924	37	161
	07/22/1968	45	196
Subtotal		1,369	9,118
UPPER WIND UNIT TOTAL		1,574	10,246
Johnstown Unit:	02/18/1914	65	380
Lefthand Unit:	————	0	0
MIDVALE IRRIGATION DISTRICT:	08/07/1906	1,197	5,684
	07/16/1908	8	40
	06/26/1913	1	5
	08/18/1922	3	14
	11/18/1943	42	198
	01/29/1946	68	324
	03/17/1960	11	52
Subtotal		1,330	6,317
RIVERTON/LE CLAIR IRRIGATION DISTRICT:	08/07/1906	240	1,140
Crow Creek	04/27/1905	56	260
	08/11/1906	8	37
	09/20/1906	23	107
	09/27/1906	100	465
	10/27/1906	84	391

Description/Source	Priority Date	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
	11/19/1906	91	423
	06/24/1907	200	930
	07/05/1907	69	318
	11/23/1907	117	544
	02/15/1908	102	474
	06/18/1908	10	47
	06/26/1908	13	60
	07/27/1908	36	167
	02/01/1909	93	433
	05/20/1909	84	388
	06/10/1909	58	270
	07/12/1909	49	228
	09/17/1909	13	60
	08/01/1910	1	5
	08/26/1910	34	158
	10/13/1910	20	93
	12/15/1910	36	169
	03/06/1911	125	581
	03/30/1911	67	312
	04/17/1911	136	632
	05/01/1911	27	126
	06/05/1911	23	108
	07/15/1911	58	270
	06/06/1912	10	47
	07/25/1912	58	270
	11/01/1912	160	745
	12/14/1912	25	116
	12/19/1912	163	759
	01/14/1913	8	37
	01/15/1913	21	96
	03/05/1913	27	126
	11/15/1913	83	386
	03/20/1914	2	9
	07/14/1914	29	132
	09/16/1914	19	87
	11/20/1914	12	58
	02/17/1915	60	280
	04/18/1916	10	46
	02/09/1917	17	79
	04/14/1917	2	10
Subtotal		2,439	11,339
Willow Creek	10/19/1912	9	44
	11/08/1926	49	239
Subtotal		58	283

Description/Source	Priority Date	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
Main Stem Wind River	04/27/1905	278	1,327
	05/05/1905	156	741
	06/18/1908	84	421
	06/22/1908	99	480
	05/17/1909	77	366
	07/23/1910	58	278
	03/29/1911	18	86
	08/16/1912	157	762
	02/04/1913	2	10
	06/26/1913	129	620
	10/27/1916	43	209
	03/30/1917	6	30
	03/29/1918	29	138
	07/18/1918	28	136
	06/25/1923	32	155
	11/20/1923	10	48
	02/25/1928	9	45
	07/18/1929	1	4
	08/17/1929	71	344
	12/01/1937	23	109
Subtotal		1,310	6,309
Wind River Basin Total		5,645	26,476
LITTLE WIND RIVER BASIN			
North Fork Little Wind River	05/05/1905	478	2,290
	11/27/1914	7	29
	04/17/1918	20	90
	11/13/1919	7	31
Subtotal		512	2,440
South Fork Little Wind River	05/05/1905	240	1,075
Main Stem Little Wind River	11/27/1914	9	47
	07/18/1919	1	5
Subtotal		10	52

Description/Source	Priority Date	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
PROJECT LANDS SUBTOTAL		5,001	26,378
NON-PROJECT LANDS— HISTORIC (including awarded Indian-owned fee lands)			
WIND RIVER BASIN:			
East Fork Wind River	06/10/1908	22	97
Dinwoody Creek	————	0	0
Sand Draw	————	0	0
Dry Creek	————	0	0
Bull Lake Creek	06/18/1919	30	140
Meadow Creek	04/27/1905	160	760
	03/30/1917	40	193
	04/17/1918	19	92
	03/28/1919	18	85
	10/28/1929	7	35
Subtotal		244	1,165
Dry Pasup Creek	10/15/1906	29	135
	12/07/1906	57	264
	08/16/1907	21	97
	05/27/1907	115	534
	07/06/1908	146	677
	01/17/1908	58	269
	04/15/1909	169	784
	10/04/1909	40	180
	04/02/1910	77	357
	11/21/1910	140	650
	01/11/1911	16	74

Description/Source	Priority Date	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
	03/30/1911	14	65
	05/11/1912	8	35
	08/12/1912	31	142
	12/13/1912	75	348
	12/19/1912	33	150
	11/14/1913	5	26
	01/24/1914	153	710
	02/19/1914	49	227
	04/16/1917	83	385
	06/22/1917	9	42
	09/27/1917	11	51
	08/14/1917	118	547
	06/12/1919	85	394
Subtotal		1,542	7,143
Mill Creek	06/21/1912	27	131
Sage Creek	08/16/1912	78	378
	04/09/1917	63	306
	08/29/1921	12	63
	05/14/1923	1	3
Subtotal		154	630
Crooked Creek	————	0	0
Trout Creek	————	0	0
Spring Creek	————	0	0
Bighorn Draw	————	0	0
Little Wind River Basin Total		943	4,328
BIG HORN RIVER BASIN			
Main Stem Big Horn River	06/18/1908	15	78
	02/08/1909	28	145
Subtotal		43	223
Cottonwood Creek	08/11/1906	40	206
	10/08/1906	57	295
	01/28/1907	22	113

Description/Source	Priority Date	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
	03/02/1907	13	67
	04/29/1907	9	46
	09/06/1907	39	201
	06/18/1908	43	225
	07/16/1908	42	215
	10/05/1908	12	64
	03/01/1909	10	52
	03/21/1910	104	535
	05/01/1912	58	299
	12/13/1912	36	184
	12/17/1915	22	133
	08/16/1918	14	71
	03/16/1925	6	31
Subtotal		527	2,737
Fivemile Creek	12/19/1912	156	761
Muddy Creek	01/01/1884	87	413
	11/22/1905	49	234
	08/13/1906	45	214
	10/04/1906	85	404
	12/14/1906	43	214
	03/02/1907	105	499
	03/16/1907	10	47
	05/01/1907	75	359
	08/01/1907	107	509
	09/06/1907	86	408
	01/13/1908	63	299
	01/17/1908	26	124
	07/16/1908	9	44
	07/20/1908	149	708
	08/31/1908	18	85
	12/05/1908	38	181
	02/03/1909	51	240
	03/01/1909	34	163
	11/04/1909	3	13
	11/26/1909	87	413
	12/20/1909	4	20
	04/19/1910	147	698
	05/26/1910	7	33
	09/16/1910	167	793
	10/06/1910	7	33
	03/14/1912	24	114
	03/18/1912	9	44
	12/13/1912	29	138

Description/Source	Priority Date	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
	12/19/1912	290	1,377
	01/15/1913	7	36
	02/05/1913	87	413
	06/11/1913	1	4
	09/09/1913	61	290
	03/07/1914	100	475
	03/18/1915	40	190
	04/24/1915	12	57
	04/19/1916	29	138
	01/31/1919	5	25
	08/27/1921	32	158
	12/03/1924	28	133
	07/29/1930	12	57
Subtotal		2,268	10,797
Dry Muddy Creek	———	0	0
Maverick Springs Draw	———	0	0
Roundup or Warm Springs	08/11/1906	35	153
Big Horn River Basin Total		3,029	14,671
POPO AGIE RIVER BASIN			
North Fork Popo Agie River	01/05/1915	95	449
	01/23/1920	33	155
	04/07/1924	67	316
	04/17/1924	21	101
	11/02/1932	12	60
Subtotal		228	1,081
Main Stem Popo Agie River	08/11/1906	33	157
	08/26/1915	1	8
Subtotal		34	165

Description/Source	Priority Date	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
Popo Agie River Basin Total		262	1,246
OWL CREEK BASIN			
South Fork Owl Creek	07/16/1908	26	124
	08/19/1908	117	558
	10/05/1908	18	89
	05/10/1909	21	101
	10/02/1909	80	382
	09/12/1910	63	301
	01/16/1911	8	37
	03/27/1911	8	39
	05/22/1911	3	16
	11/07/1924	29	142
	01/14/1926	14	67
Subtotal		387	1,856
Main Stem Owl Creek	08/22/1907	246	1,168
	06/18/1908	142	672
	08/19/1908	19	90
	05/08/1909	116	551
	10/02/1909	211	994
Subtotal		734	3,475
Mud Creek	11/22/1905	87	413
	07/10/1908	58	275
	07/18/1908	61	290
	01/01/1909	7	35
	06/10/1909	135	641
	07/25/1910	65	309
	09/29/1913	18	86
	07/11/1912	136	646
	07/22/1912	4	19
	11/14/1916	27	130
	02/02/1918	64	302
	01/15/1919	28	133
	07/30/1919	9	42
	08/10/1924	2	13
	08/16/1924	57	269
Subtotal		759	3,603
Red Creek	11/22/1905	83	394
	12/15/1907	11	51

Description/Source	Priority Date	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
	12/16/1907	56	268
	08/16/1908	22	103
Subtotal		172	816
Owl Creek Basin Total		2,052	9,750
NON PROJECT LANDS SUBTOTAL		11,931	56,471
PROJECT LANDS SUBTOTAL		5,001	26,378
TOTAL HISTORIC PROJECT AND NON-PROJECT LANDS		16,932	82,849
FUTURE PROJECTS			
RIVERTON EAST	07/02/1910	423.0	1,947.0
FUTURE PROJECT TOTALS		423.0	1,947.0

4. The sole purpose behind the creation of the Wind River Indian Reservation was agricultural, which included related uses, domestic and livestock.

5. A reservation reserved water right does not exist in favor of the United States nor Tribes for the purpose of any of the following uses: industrial, mineral, municipal, fisheries, wildlife or aesthetics.

6. Neither the United States nor the Tribes are entitled to a reservation reserved water right for those lands outside of the stipulated boundaries of the Wind River Indian Reservation, known as the Arapahoe Ranch and the Padlock Ranch, that have been purchased and are held in trust by the United States for the Shoshone and Arapahoe Indians.

7. Neither the United States nor Tribes have a reservation reserved water right to groundwater.

8. The Tribes are entitled to make such use of the water covered by their reserved water rights they deem advisable but the use is confined to the reservation and in no event shall the consumptive use be increased.

9. The Tribes can sell or lease any part of the water covered by their reserved water rights but the said sale or lease cannot be for exportation off of the reservation and in no event shall the consumptive use be increased.

10. The Tribes are entitled to continue the use of such amounts of groundwater which they are now using, and which are not covered by reserved rights, but only so long as the present uses are continued, unless approval is obtained from the State Engineer's Office, and in no event shall the consumptive use be increased.

11. All State water permits which have later priority dates than the Court awarded reserved water right dates and which cover the same tracts of land are hereby cancelled.

12. The water rights under this Decree shall in the first instance be administered by the Wyoming State Engineer in accordance with the terms set forth herein. Prior to seeking judicial enforcement of any right under this Decree, the United States shall first request the State Engineer to exercise his administrative authority.

13. The United States and Tribes shall install or cause to be installed such measuring devices for all water rights decreed herein as may be reasonably required by the State Engineer to administer such rights adequately in the same manner and to the same effect as may be required in the future of or imposed on any other water user under Wyoming law.

14. Pursuant to W.R.C.P. 54(b), the Court finds that there is no just reason for delay for entry of final judg-

ment on the claims described herein, and therefore, ORDERS same.

Dated this 15th day of May, 1985.

/s/ Alan B. Johnson
ALAN B. JOHNSON
District Judge

[Certificate Omitted in Printing]

APPENDIX E

IN THE DISTRICT COURT FOR THE
FIRST JUDICIAL DISTRICT
STATE OF WYOMING, COUNTY OF LARAMIE

Docket No. 101-234

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING.

[Filed June 8, 1984]

ORDER RULING ON MOTIONS TO ALTER OR AMEND THE DECISION OF MAY 10, 1983

THE ABOVE CAPTIONED MATTER has come before the Court for resolution of the following motions made after entry of the Decision and Judgment and Decree of May 10, 1983:

(a) Motion to Amend Findings of Fact and Judgment and Decree, filed by the State of Wyoming through its Attorney General;

(b) The United States' motion to alter or amend the Court's May 10, 1983, Judgment, filed by Department of Justice, Land and Natural Resources Division;

(c) Motion to Alter or Amend Judgment, filed by the Arapahoe and Shoshone tribes of the Wind River Indian Reservation, through their attorneys.

Hearings were conducted on July 14, 1983, and November 15, 1983, in the Courtroom, The County Building, Cheyenne, Wyoming. Appearing and participating for the various parties to the motions were:

(a) Michael D. White, Nossaman, Kreuger, and Marsh, Denver, Colorado, Special Assistant Attorney General, State of Wyoming, and Randall T. Cox, Assistant Attorney General, State of Wyoming, representing the State;

(b) James J. Clear, Attorney, Indian Resources Section, Department of Justice and Joseph Membrino, Attorney, Office of the Solicitor, Department of Interior, both from Washington, D.C., representing the United States;

(c) Robert S. Pelcyger, Attorney at Law, Fredericks and Pelcyger, Boulder, Colorado, and William J. Thomson, Attorney at Law, Dray, Madison, and Thomson, Cheyenne, Wyoming, counsel for the Arapahoe Tribe;

(d) Harry Sachse and William R. Perry, Attorneys at Law, Sonosky; Chambers, Sachse and Guido, Washington, D.C.; and William J. Thomson, Attorney at Law, Dray, Madison and Thomson, Cheyenne, Wyoming, counsel for the Shoshone tribe.

At the hearing on July 14, 1983, the briefs submitted in support of each party's motions were considered by the Court as were oral arguments on behalf of each party's contentions. On August 2, 1983, the Court entered its Order Regarding Reacquired Lands and Setting a Hearing which had the effect of striking paragraph 14 of the Judgment and Decree of May 10, 1983, relieving the parties of the pressure to proceed with appeals and directing the parties to prepare a Joint Statement identifying tracts of land reacquired by the Tribes or by the United States in trust or by individual Indians in fee,

the date each tract first left Indian ownership, the date of any state water permit or water certificate for each tract, and the reacquisition date.

On November 15, 1983, the parties appeared before the Court for further hearing on matters related to the above motions, but specifically devoted to issues surrounding lands which had been transferred by or on behalf of Indians to non-Indians and which were later reacquired by the Tribes or by individual Indians in fee. A number of stipulations by and between the parties were presented to the Court.

(a) A stipulation was presented to the Court that the Judgment and Decree of May 10, 1983, be amended to identify and correct lands erroneously included in the quanification of Indian reserved water rights. The Court entered its Order granting amendment to the judgment and decree, approving the stipulation and amending the decree.

(b) A stipulation of fact with Exhibits A and B was received as part of the record, which set out reacquired trust land within the classification of historic tracts as practicably irrigable (Exhibit A) and reacquired trust land within the classification of future projects (Exhibit B).

(c) A stipulation of fact with Exhibit C was received as a part of the record, which describes and lists all Indian owned fee tracts (except Tracts 16, 44, and portions of Tracts 90 and 119) awarded in the decision of May 10, 1983.

(d) A stipulation of fact with Exhibit D describing disputed tracts, which the State contends should be deleted from consideration in the calculation of the reserved water rights.

(e) A stipulation of corrections (Exhibit E) to be made by the Court to paragraph 1 of the Judg-

ment and Decree of May 10, 1983, without further evidence being received by the Court.

The Court then heard testimony in the form of offers of proof from Mr. James D. Voeller, Mr. Craig L. Sommers, and Mr. Ronald Billstein, who testified as to reacquired land, which remains in dispute.

The Court has reviewed the arguments, the memoranda, the stipulations of fact, and the offers of proof, and it finds and discusses the various elements of the motions filed by the parties in the following paragraphs.

STATE OF WYOMING MOTION TO AMEND PARAGRAPH 3 OF THE JUDGMENT AND DECREE: a. TO MAKE A DETERMINATION OF SEVERAL UNRESOLVED ISSUES WHICH, UNTIL THEY ARE DETERMINED WITH FINALITY, PRECLUDE APPEAL OF THE FINAL ORDER PURSUANT TO RULE 54(b) W.R.C.P.

The parties have submitted stipulations of fact accompanied by exhibits described above, which resolve issues related to the calculation of reacquired lands from non-Indian owners. The stipulations received by the Court make further action by it unnecessary.

STATE OF WYOMING MOTION TO AMEND PARAGRAPH 3 OF THE JUDGMENT AND DECREE: b. TO PROVIDE THAT THE PRIORITY DATES FOR REACQUIRED LANDS ARE THOSE DATES WHEN EACH TRACT WAS REACQUIRED.

After consideration of the arguments submitted by the parties, the Court will affirm the decision of Judge Joffe, holding that the priority date of reacquired acreage owned by Indians in fee or by the United States in trust for the Tribes shall be the earlier of two dates: the date of the applicable state water permit or the date land left Indian ownership and was purchased by a non-Indian.

The date of the applicable state water permit shall be the date as identified as "water right date" set out in Exhibits A, B, C, and D, entered into the record on November 15, 1983, and to which the major parties have stipulated.

STATE OF WYOMING MOTION TO DELETE THE LANGUAGE IN THE JUDGMENT AND DECREE ADOPTING THE SPECIAL MASTER'S REPORT.

The Special Master's Report, written after months of trial, is the cornerstone of the case. The Court approved and adopted the Special Master's Report, except where it is inconsistent with the Judgment and Decree. It is hardly surprising that differences have arisen as to the conclusions to be drawn from the facts in a case of this magnitude.

STATE OF WYOMING MOTION TO CLARIFY THE DECREE BY PROVIDING THAT DIVERSIONS OF WATER FOR DOMESTIC AND LIVESTOCK WATERING USES ARE INCLUDED AND SUBSUMED IN THE DIVERSIONS AWARDED IN PARAGRAPHS 1 AND 2 OF THE JUDGMENT AND DECREE.

Paragraph 4 of the Judgment and Decree states that "the sole purpose behind the creation of the Wind River Indian Reservation was agricultural, which included related uses, domestic and livestock." The Court considers the wording to be clear.

STATE OF WYOMING MOTION TO MODIFY THE JUDGMENT AND DECREE TO CORRECT FOR ARITHMETIC ERRORS IN CALCULATING THE NUMBER OF PRACTICABLY IRRIGABLE ACRES.

The stipulation of the parties correcting the Court's determination of practicably irrigable acres is approved and accepted as contained in Exhibit E, entered herein on November 15, 1983. Paragraph 1 of the Judgment and Decree should be amended to reflect the corrections

and a copy of the Stipulation and Exhibit E is attached to this decision and is incorporated into it.

STATE OF WYOMING MOTION TO MODIFY THE DECREE TO MAKE IT CONSISTENT WITH EXPRESS RULINGS OF THE COURT BY DELETING RESERVED WATER RIGHTS INADVERTENTLY AWARDED TO . . . LANDS OUTSIDE THE STIPULATED BOUNDARIES OF THE WIND RIVER INDIAN RESERVATION.

A Stipulation dated November 15, 1983, signed by the attorneys for the major parties and C. Edward Webster II, attorney for various water uses in the Owl Creek Drainage and in Hot Springs County, Wyoming, which identified tracts of land and corresponding grant of reserved water rights for said lands, reduced the amount of water right granted because the tracts lie outside of the stipulated boundaries of the Wind River Indian Reservation, and for which a reserved water right was erroneously awarded.

By a previous order the Court accepted the stipulation and ordered that the May 10, 1983, Judgment and Decree be amended so that paragraph 1 from the heading "Owl Creek Basin" on page 68 of the Judgment and Decree to the conclusion of that paragraph shall read:

OWL CREEK BASIN

South Fork Owl Creek	898	3,976
Main Stem Owl Creek	674	3,196
Mud Creek	766	3,620
Red Creek	0	0
Subtotal	2,338	10,792
NON-PROJECT LANDS SUBTOTAL	25,132	118,386
PROJECT LANDS SUBTOTAL	27,762	162,911
TOTAL HISTORIC PROJECT LANDS AND NON-PROJECT LANDS	52,894	281,297

STATE OF WYOMING MOTION TO MODIFY THE DECREE TO MAKE IT CONSISTENT WITH THE COURT'S EXPRESS RULINGS BY DELETING RESERVED WATER RIGHTS INADVERTENTLY AWARDED TO LANDS OWNED BY NON-INDIANS.

The State of Wyoming has presented testimony that in collecting and preparing information contained in the Stipulations of Fact received by the Court on November 15, 1983, pertaining to reacquired acreage, the State discovered new evidence as to alleged ownership by non-Indians of certain tracts of land. These tracts may be identified by reference to Exhibits D and F, submitted to the Court on November 15, 1983. The testimony produced by the State and by the United States was submitted under an offer of proof.

The Court has considered this matter and is of the opinion that it would not be beneficial to reopen the case to receive further evidence. The evidence has not been examined by opposing parties and to receive it would serve no purpose. Further, the State has not demonstrated to the Court that this evidence was not reasonably discoverable and subject to production at trial. W.R.C.P. 59(a)(7). Accordingly, the Court will not receive as evidence the testimony reflected in the offers of proof and exhibits tendered to the Court during the presentation of those offers.

STATE OF WYOMING MOTION TO CLARIFY THE LIMITATIONS CONTAINED WITHIN THE JUDGMENT AND DECREE UPON OFF-RESERVATION USE OF RESERVED WATER RIGHTS BY DEFINING THE TERM "RESERVATION" TO INCLUDE ONLY TRUST LANDS AND INDIAN-OWNED FEE LANDS.

The Court is of the opinion that the Judgment and Decree does not require further clarification and that ample evidence appears in the record to support the findings of the Special Master and the Court.

STATE OF WYOMING MOTION TO MODIFY WATER DUTIES SO THAT THEY ARE ACTUALLY BASED ON 40% EFFICIENCY, AS BOTH THE MASTER AND COURT INTENDED THAT THEY SHOULD BE.

Testimony was given that the historic efficiency of irrigators in Water Division No. 3 averages 35%. This figure varies due to variances in terrain, soil composition, irrigation systems and water management. The State argued for the imposition of an irrigation efficiency requirement of 50%. Floyd Bishop, former Wyoming State Engineer, testified for the State that in his opinion a 50% efficiency rate is achievable. However, he named no area in all of Wyoming where a 50% efficiency ratio has been achieved. (Page 138, Master's Report).

The Special Master concluded, on page 181, that "it would be unreasonable and inequitable to impose a duty on the Indians which is far in excess of what is currently expected of other water users in Water Division No. 3." He said, on page 139, "I also find that an increase of 5% in the overall irrigation efficiency (to 40%) the historic lands would not be unreasonable or overly burdensome to the irrigators here, in light of all the evidence."

This overall efficiency percentage reflects the Master's finding that there are areas within Water Division No. 3 where an actual efficiency requirement of 40% would be harsh, and he has allowed some room for flexibility, but his figures do reflect an *overall* efficiency of 40%. Therefore, to grant the motion of the State of Wyoming would be to impose a burden on Indian water users which was not the intention of either the Master or the Court.

STATE OF WYOMING MOTION TO DELETE THE PROVISION FOR CONTINUED USE OF SURFACE WATER IN PARAGRAPH 10 OF THE JUDGMENT AND DECREE.

The Court has determined, after reviewing the record in this case, that there is no current use by the Tribes of surface water which is not encompassed by the reserved water right determination by the Court. The motion of the State should be granted and the words, "surface and" should be deleted from paragraph 10 of the Judgment and Decree of May 10, 1983.

THE ARAPAHOE AND SHOSHONE TRIBES' MOTION TO INCLUDE IN-STREAM FLOWS FOR FISHERY PURPOSES IN THE JUDGMENT AND DECREE.

The Tribes seek amendment of the Judgment and Decree to reserve water for "in-stream flows for preservation of optimum fish habitat." Judge Joffe applied a stricter interpretation of the implied reserved water right doctrine than that applied by Special Master Roncalio. The Judge determined that the Treaty of Fort Bridger had as its purpose the establishment of an agricultural reservation. This sole purpose provided the basis upon which the reserved right of the Tribes could be quantified. Clearly, the Court differed from the Special Master in its interpretation of the purpose of the reservation, but also as to the ultimate facts relating to the fish habitat issue. The Judge distinguished on their facts the cases relied upon by both the master and the Tribes in support of a minimum in-stream flow. *Menominee Tribe v. United States*, 391 U.S. 404 (1968) and *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir., 1981). The Judge rejected the claim in this case that the sale of recreational fishing licenses to members of the public by the Tribes represents a significant factor related to the Indians' lifestyle. From an historical perspective, the

Court determined that the Tribes failed to show that fishing has been significant. Correctly, the Judge noted that the Tribes here are not involved in commercial fishing. To describe the activity of the Tribes as maintaining fisheries is misleading; rather the drainage discussed in this case as one of its aspects is a fish habitat within and without reservation boundaries.

The Tribes rely upon *U.S. v. Shoshone Tribe*, 304 U.S. 110, 116, 82 L.Ed. 1213, 1218, and contending that the Court's decision as to the purpose of the reservation as set forth in the treaty should dictate an implied reserve water right for minimum in-stream flows for fish habitat. *Shoshone Tribe* is a case that interprets the treaty in light of compensation for a taking of the Shoshone Tribe's property rights by the United States. The opinion held that the United States retained no beneficial interest in the timber or lands that were made part of the reservation to the Shoshone Tribe. As noted at 82 L.Ed. 1219, the treaty provides:

> "• • • plainly evidence purpose on the part of the United States to help create an independent permanent farming community upon the reservation."

The reserved water right quantified by Judge Joffe does not deny the Tribes the ability to regulate in-stream flows in order to maintain what may be considered necessary water for optimum fish habitat, nor does the opinion limit any such power that may exist on the part of the Tribes. The Tribes may seek to dedicate their stream flows for fish habitat by using water reserved to them by the decision.

THE ARAPAHOE AND SHOSHONE TRIBES' MOTION TO ELIMINATE THE STORAGE CONDITION IN PARAGRAPH 2 OF THE JUDGMENT AND DECREE.

In tihs case, the standard of measurement used by the Special Master and the Court to determine the present

and future needs of the Tribes, as promulgated by the United States Supreme Court in *Arizona v. California*, 373 U.S. 546 (1963), is practicably irrigable acreage. To develop the presentation of evidence in a logical way, the parties divided the claims for water in this case into two categories: the water for lands now and historically irrigated, called the "historic" acreage, and waters for lands not now irrigated, but which would qualify now or in the future as practicably irrigable acres, called the "future" acreage.

The ramifications of the granting of a reserved water right for these two categories are that the reserved water right award for "historic lands" preserved the status quo of water use in the Big Horn Basin, but that the grant, and immediate use of the water award for "future acreage" would give the Tribes an 1868 priority date for water to which they previously had not used nor claimed. This is the issue which has caused so much uncertainty and emotional reaction in this case: Will the reserved water right award, allowing full use by the Tribes of water granted for future acreage without imposing some kind of storage condition impose an impossible burden on other water users?

The Tribes, in their motion to amend the District Court's Decree, which limits the exercise of the right to use 188,937 acre feet of water per year to irrigate "future lands," argue that the Court-imposed condition has the effect of negating their water right, undermines it, and is inconsistent with the 1868 priority to which the Tribes are entitled by virtue of the Court's ruling.

The Special Master and Judge Joffe struggled with the problem of the possible effects of the immediate use of the water allocated for future needs on the other water users in the Basin. There was some testimony presented in the case that allowing full use of the water granted for future acreage without imposing some kind of storage condition would impose a great burden on other wa-

ter users. Both men were influenced by the admonitions of Justice Powell of the United States Supreme Court in *United States v. New Mexico*, 438 U.S. 696, 57 L.Ed.2d 1052, 1068, who said:

> "I agree with the court that the implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and to Congress's general policy of deference to state water law." (Citations omitted.)

Both Judge Joffe and Special Master Roncalio concluded, in the absence of any Supreme Court cases to give guidance, that the circumstances of the case dictated a judicially-imposed limitation on the exercise of the reserved right award as it applies to future needs.

Judge Joffe based his argument to limit the reserved right for future projects on the doctrine of equitable estoppel. However, he did not discuss the element of affirmative misconduct, which appears to apply to the application of the doctrine of equitable estoppel against the United States. I am of the opinion that a finding of affirmative misconduct is an essential element in order to create an estoppel against the United States. *Schweiker v. Hansen*, 450 U.S. 785, 788-89 (1981) (per curiam); *INS v. Hibi*, 414 U.S. 5, 8-9 (1973) (per curiam); *United States v. Harvey*, 661 F.2d 767, 775 (9th Cir. 1981, *Cert.Den.*) 1035 S.Ct. 74, *Lavin v. Marsh*, 644 F.2d 1387, 1382 (9th Cir. 1981); *United States v. Ruby Co.*, 588 F.2d 697 (9th Cir. 1978). In *Lavin v. Marsh*, supra, the proposition was established that silence, acquiescence or even negligence will not constitute affirmative misconduct for the purposes of establishing that element for equitable estoppel against the United States. *United States v. Nez Perce County, Idaho*, 553 F. Supp., 187, 192-93 (D. Ida. 1982).

I can find no evidence in the record to support a finding of affirmative misconduct by the Federal Government

in the development of the Wind River Indian Reservation to support the limitation on the Tribe's right to "future water" as set out in paragraph 2 of the Decree.

However, this is not to say that the implied-reserved-water-doctrine may not be applied with limitations and restrictions. Mr. Justice Rehnquist most aptly observed in *United States v. New Mexico*, 57 L.Ed.2d at 1056:

> "In arid parts of the West, however, claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams. This competition is compounded by the sheer quantity of reserved lands in the Western States, which lands form brightly colored swaths across the maps of these States."

What complex factual situation is more illustrative of the competing pressures for water and upon the doctrine of implied-reserved-water-rights than this case?

However, the definition of what "bundle" of rights may be encompassed within the term implied-reserved-water-doctrine, and what restricts or limitations may be imposed its exercise is not at all clear.

> "While many of the contours of what has come to be called the 'implied-reservation-water-doctrine' remain unspecified, the Court has repeatedly emphasized that Congress reserved 'only that amount of water necessary to fill the purpose of the reservation, no more.' *Cappaert*, supra, at 141, 48 L.Ed.2d 523, 96 S.Ct. 2062. See *Arizona v. California*, supra, at 600-601, 10 L.Ed.2d 542, 883 S.Ct. 1468; *District Court for Eagle County*, supra, at 523, 28 L.Ed.2d 278, 91, S.Ct. 998. Each time this Court has applied the 'implied-reservation-of-water doctrine,' it has

> carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated."

By interpreting the purpose of the reservation, the Court in a real sense defines and expresses the limitations of the implied reservation of water.

I am reluctant to change an essential part of the Judgment and Decree of May 10, 1983, because I understand the dilemma faced by Judge Joffe and by Special Master Roncalio in reaching their decisions. However, I can find no basis in the law for denying the Tribes the enjoyment of their vested right to 188,937 acre feet of water per year, identified as the water for "future lands." As in all the water granted in this case, these terms have been used for identification and measurement, but the tribes are not limited in the character of use of the water.

The Tribes are still bound by the strictures of paragraph 8 and 9 of the Decision limiting use of their water to the confinements of the reservation itself. This holding is consistent with other language of the decree, that the primary purpose of the reservation is agricultural and that the measurement of water for future as well as present needs of the reservation is ". . . enough water to irrigate all the practicably irrigable acres on the reservation." Establishment of the reservation as a homeland and development of it as such has been the controlling theme of these proceedings. Therefore paragraph 2 of the Judgment and Decree should be amended to read:

> 2. The United States has reserved, by virtue of the Treaty of Fort Bridger, July 3, 1868, and for the benefit of the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation, the right to divert water, or to have water diverted, in the

amounts set forth herein and identified, but the use not limited to, the five future projects.

IT IS HEREBY ORDERED:

1. The motion of the State to amend paragraph 3 of the Judgment and Decree is denied in view of the stipulations and exhibits tendered by the parties to the Court, which in large measure resolve issues of lands reacquired by the United States, Tribes, and Indians, from non-Indian ownership.

2. The State's Motion to Amend Paragraph 3 of the Judgment and Decree to establish as priority dates for reacquired lands the date the land was reacquired, is denied in view of the express determination of the Court that the priority date shall be the earlier of the date of the applicable state water permit or the date land left Indian ownership and was purchased by a non-Indian. The date of the applicable state water permit shall be the date as identified as "water right date" in Exhibits A, B, C, and D to the Stipulations of Fact received by the Court on November 15, 1983.

3. The motion of the State to delete language in the Judgment and Decree adopting the Special Master's Report is denied.

4. The State's Motion to Further Clarify the Judgment and Decree by providing that diversions of water for domestic and livestock watering uses are included and subsumed in the diversions awarded in paragraphs 1 and 2 of the Judgment and Decree is denied for the reason that the Decree is clear and that such uses are included.

5. The Judgment and Decree is amended to reflect the corrections, which were the subject of a stipulation of fact by and between the parties hereto and which is reflected in Exhibit E to that Stipulation as received by the Court on November 15, 1983. Exhibit E is attached hereto and is incorporated into this Order.

6. The State's Motion to Modify the Decree to Correct the Decree to Eliminate the Granting of Implied Reserved Water Rights to Certain Lands Outside of the Stipulated Boundaries of the Wind River Indian Reservation has been previously granted pursuant to stipulation entered into by and between the concerned parties. Accordingly, the State's Motion having previously been granted, it will be the Court's determination that further action is unnecessary and that this matter is now moot.

7. The State's Motion to Modify the Judgment and Decree by reopening and taking evidence in this matter as to possible lands owned by non-Indians is denied.

8. The State's Motion to Clarify the Judgment and Decree upon off-reservation use of reserved water rights by defining the term "reservation" to include only trust lands and Indian-owned fee lands is denied.

9. The State's Motion to Modify Water Duties so that they are actually based on 40% efficiency should be denied for the reason that the State of Wyoming is asking the Court to make an assumption which is not supported by the record. It appears that the 40% efficiency determination was applied overall.

10. The State's Motion to Delete the provision for continued use of surface water in paragraph 10 of the Judgment and Decree is granted and the words "surface and" shall be and hereby are deleted from paragraph 10 of the Judgment and Decree of May 10, 1983.

11. The Motion of the Tribes to include an implied-reservation-of-water for minimum in-stream flows for fish habitat purposes in the Judgment and Decree is denied.

12. The Tribes' Motion to Eliminate the Storage Condition Imposed in Paragraph 2 of the Judgment and Decree of May 10, 1983, is granted. Paragraph 2 of the

Judgment and Decree shall be and hereby is, amended to read:

> 2. The United States has reserved, by virtue of the Treaty of Fort Bridger, July 3, 1868, and for the benefit of the Shoshone and Arapahoe tribes of the Wind River Reservation, the right to divert water, or to have water diverted, in the amounts set forth herein and identify, but the use not limited to, the five awarded future projects.

Dated this 8th day of June, 1984.

/s/ [Illegible] Johnson
Judge

APPENDIX F

IN THE DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT
STATE OF WYOMING

Civil No. 4993

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING.

Harold Joffe, District Judge

Decision

Concerning Reserved Water Right Claims
By and On Behalf of The
Tribes of the Wind River Indian
Reservation, Wyoming

May 10, 1983

IN THE DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT
STATE OF WYOMING

Civil No. 4993

IN RE: IN GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING.

Decision

For the purpose of this decision, the State of Wyoming will sometimes be referred to as "State of Wyoming" and "State", the United States of America will sometimes be referred to as "United States", and the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation will sometimes be referred to as "Tribes." On occasion, a reference will be made to the "United States and the Tribes", and this term may refer solely to either the Tribes or the United States.

When the Court is referring to the Indian reserved water right which would have a priority date of 1868, the Court uses the phrase "reservation reserved right." When the Court uses the term "reserved right", the Court has reference to the reserved right in general, or a reserved right which has a priority date other than the 1868 reservation date.

Statement of the Case

The complaint in this case was filed by the State of Wyoming on January 24, 1977, in the District Court of

the Fifth Judicial District of Wyoming, in Washakie County, as a general adjudication to determine all the rights to use water in the Big Horn River System and all other sources in Water Division No. 3, State of Wyoming. The United States was named as defendant in its own right and on behalf of the Arapahoe and Shoshone Indian Tribes of the Wind River Reservation.

In response, the Department of Justice filed a petition for removal of the case from State Court to the United States District Court for the District of Wyoming. Federal Judge Ewing T. Kerr remanded the case to the State Court, concluding that the jurisdiction was properly in the Wyoming State Court. The United States then filed a motion to dismiss the complaint.

Following this, this Court ruled that the provisions of Section 1-1054.1 Wyoming Statutes provide for an adjudication of water rights within the meaning of the McCarran Amendment, and that the State Court has jurisdiction over the matter. The Court also determined that the Shoshone and Arapahoe Tribes are proper parties to the litigation. The United States and the Tribes preserved for appeal the issue of jurisdiction.

The case was assigned for hearing to a Special Master, Teno Roncalio, of Cheyenne, Wyoming, who separated the case for hearing into three parts, the Indian Claims, the non-Indian Claims and the uncancelled permits.

In this portion of the case, the Indian Claims, the United States has claimed reserved water rights for the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation for agriculture, fisheries, wildlife and aesthetics, mineral development and domestic, municipal and industrial uses.

The Tribes endorse the claims made by the United States on their behalf, but find them insufficient, asserting that greater amounts of water are necessary to satisfy present and future needs of the Reservation.

The State of Wyoming denies that the United States and Tribes are entitled to the rights they claim on behalf of the Wind River Indian Reservation, citing a number of legal theories and facts. Wyoming contends than no reservation reserved water right was created on behalf of the Wind River Indian Reservation when the Reservation was created by Treaty on July 3, 1868, or that, if created, has since been abrogated or lost. Finally, even if the United States did intend to create reservation reserved rights on behalf of the Wind River Reservation when it created the reservation, Wyoming contends that the United States is now estopped from claiming those rights. If the Court finds that reserved rights were created and were never abrogated, Wyoming argues that all general limitations inherent in the reserved rights doctrine must apply to those rights.

Background of the Case

Wyoming's Big Horn River System (Water Division No. 3) consists of all lands within the state drained by the Big Horn River and its tributaries and by Clark's Fork and its tributaries. It is located in Fremont, Hot Springs, Washakie, Big Horn and Park counties in northwestern and west central Wyoming and includes parts of Yellowstone National Park. The Wind River Indian Reservation, which contains approximately 4000 square miles, is located in the southeastern portion of the region.

The area includes numerous mountain ranges and basins. Among the ranges are the Absaroka in the northwest, the Wind River in the south, the Owl Creek in the central area, and the Big Horn in the east. The two major basins are the Wind River in the southeast and the Big Horn in the northeast. The Wind River Indian Reservation occupies most of the Wind River Basin and is surrounded by the southeastern portion of the Wind River Range to the west and southwest and the Owl Creek Range to the north.

The topography of the area is varied. It includes mountain peaks and valleys, high plateaus, terraced stream valleys and low desert badlands. Elevations range from over 13,000 feet in the Wind River Range to 3,870 feet near a town called Basin. On the Reservation the elevation varies from 12,500 feet in the Wind River Range to 4,500 feet at the northeastern corner near the Wind River Canyon.

The primary drainage systems in the region are the Wind River/Big Horn River which originates in northern Fremont County and leaves the Division at the Wyoming/Montana border in northern Big Horn County; the Clark's Fork River which drains much of the northwestern portion of the region, originating and existing in northwestern Park County; and the Shoshone River, a major tributary of the Big Horn River which originates in northern Park County and joins the Big Horn at the Yellowtail Reservoir.

Because of the semi-arid nature of the region, all the settlements, Indian and non-Indian alike, were and are dependent on water for establishment and continuance. The social and economic life of the basin as a whole is directly dependent on water, with irrigated agriculture being the mainstay of human endeavor.

History of the Region

The history of the Big Horn Basin for purposes of this case begins in the early 1800's when explorers, trappers and traders began travelling into and through northwestern Wyoming, part of the vast hunting grounds of the peripatetic Shoshone Indians. Neither group encroached on the other and relations were friendly. However, as more non-Indians moved into the area, to preserve peace and stability, the United States reached an agreement in 1863 generally delineating the boundaries within which the Eastern Shoshone roamed, a 44,672,000

acre region comprising parts of Wyoming, Colorado and Utah.

Following the Civil War, as the westward movement gained momentum, the U.S. Government realized the size of the region set aside for Indians only was unrealistic, and on July 3, 1868, executed the Second Treaty of Fort Bridger with the Shoshone and Bannock Indians, establishing the Wind River Indian Reservation. In 1878, the Arapahoe Indians were placed on the Reservation. They settled in the southeast; the Shoshone had established their settlements in the western portion of the Reservation.

During their first years on the Reservation, the Shoshone Indians were still dependent on the buffalo as the mainstay of their life. However, as the supply rapidly decreased, they began a changeover to an agricultural economy. During the 1870's, the Shoshone Indians increased their efforts in both farming and ranching. By the 1880's and early 1890's, however, it was evident that the agricultural economy of the Indians was failing. By 1895, the Indians on the Wind River Indian Reservation were starving, desperate and totally dependent on the government for food, clothing and shelter. These economic misfortunes compelled them to sell some of their land in 1896 to the United States.

An additional 1,480,000 acres of Reservation land were sold in 1904/1905 to the Government in the Second McLaughlin Agreement. The revenue from the sale helped develop the remaining Reservation lands (which came to be known as the "diminished reservation"). The U.S. Government offered the ceded lands for sale to others, under the provisions of the homestead, townsite, coal mineral land laws, and reimbursed the Tribes or expended for the benefit of the Tribes whatever money was raised by the sales.

The earliest non-Indian settlements in northwestern and north central Wyoming were made near the gold and

silver fields in the South Pass area of the Wind River Range. These mining camps soon expanded into permanent farming and ranching communities. The settlements relied primarily on cattle ranching and dryland or easily irrigated farming for sustenance. By the mid-1800's, many small communities had been established by settlers who had obtained their land under such Congressional Disposal Acts as the Homestead Act, the Desert Lands Act, and the Carey Act.

By the early 1900's most of the suitable land in the region was occupied by ranchers or irrigated farms. Yet the settlers continued to arrive, forcing gradual expansion onto the dry basin floors. This movement prompted the development of many irrigation projects, often sponsored jointly by private citizens and the United States Government.

The arrival of the homesteaders in the Wind River Basin significantly altered the Indian's economic base. As the number of settlers and their farms increased, the number of Indians working their own farms and ranches decreased. The Indians began to rent and eventually to sell their land, while hiring themselves out as laborers.

In 1934, all undisposed of lands that had been ceded to the U.S. by the 1904 agreement were reserved, and in 1940, the Secretary of Interior began a series of restorations to tribal ownership, certain undisposed of lands which were then made a part of the existing Wind River Reservation. In addition, non-restored ceded land was later reacquired by the United States in trust for the Tribes, as were certain lands within the diminished reservation which previously had passed into private ownership.

Special Master's Report

On January 5, 1983, the Special Master filed his report in this Court; a 451-page volume reported his findings, conclusions and recommended decree on the reserved wa-

ter right claims of the Tribes of the Wind River Indian Reservation. This report demonstrates to the Court its rightful exercise of judicial wisdom in selecting Teno Roncalio as Special Master when the Court considers the monumental assignment that confronted the Special Master in dealing with the many complex issues that exist in this lawsuit. This taken into consideration with the almost four years of conferences, hearings and trials held by him with more than 100 attorneys involved in the case leads this Court to the inescapable conclusion that the Special Master handled a Herculean task in a very capable and judicious manner with very reasonable dispatch.

The United States, the Tribes, the State and numerous other parties have filed various written objections to the Special Master's Report which the Court considers together with all the other records in the case.

This Court is cognizant of Rule 53(e)(2) W.R.C.P. which provides: ". . . the Court shall accept the Master's findings of facts unless clearly erroneous" and that "the Court, after hearing, may adopt the report or may modify it. . ." The Court meets with no problem in adopting the Special Master's findings of facts except where a finding is inapplicable to this decision as a result of the Court taking a different position than the Special Master on certain conclusions of law. Such a different position has been reached by the Court in conclusions of law covering the following issues:

1. That the Tribes' reserved water rights, if they exist, are limited to that amount of water necessary to fulfill the primary purpose of the reservation which was agriculture. (When the Court refers to agricultural use, it is including domestic use and livestock use within the meaning of the term and excepts industrial, mineral, municipal, fisheries, wildlife and aesthetics.)

2. To accomplish the purpose of the reservation, Congress did not reserve water for mineral development, municipal needs, industrial development, fisheries, wildlife nor protection of aesthetic natural conditions on the Wind River Indian Reservation. (Provision is made later in this decision to provide water to the Tribes for their now present multipurpose uses.)

3. All Reservation land owned by Tribes in trust or in fee, which at one time was held by a non-Indian, does not have a priority date of July 3, 1868.

4. Beneath the land which is theirs in trust or in fee, the Tribes do not have a reserved right to the groundwater in any of the various aquifers, beyond any now established uses and amounts, but have the right to use any such additional groundwater on equal footing with and under the same restrictions as other water users in the State of Wyoming.

To better understand the Court's reasoning on its departure from the Special Master's position on the above-stated issues, the Court proceeds to discuss the background and facts of this case together with its interpretation of the case law as it applies to the reserved right doctrine.

Reserved Rights

Before the Court can attempt to discuss any of the four above-stated issues, its must first come to grips with the paramount question which demands an answer before all others. Did the Treaty of 1868 reserve for the Tribes the waters needed to develop the Reservation? For if the Court were to answer such question in the negative, then all other issues which this Court has to meet become moot.

The State has espoused the belief that Congress did not intend to reserve water for the Wind River Reserva-

tion and the State is supported in its position by many of the individual defendants who have replied in the lawsuit. The State of Wyoming in such belief finds itself in an antithetical posture from the Tribes and the United States who maintain that at the creation of the Wind River Reservation by the Treaty of Fort Bridger on July 3, 1868, a reserved water right vested in a quantity to meet the present and future needs of the Wind River Indian Reservation and to provide a permanent home for the Tribes.

To sustain the State's position and hold that no reserved right exists would be, on the Court's part, a holding that not only disagrees with this Court's interpretation of what the intent of Congress was but also runs counter to the controlling case law on the subject.

When the reservation was created, the Indians gave up a larger tract of land which had adequate water, satisfying the habits and wants of a nomadic people, for the smaller tract of land with the purpose of changing those habits and turning the Indians into an agrarian society. Would they have given up the one commodity which was so vital and necessary to their new intended purpose of the land? Even though water was not specifically mentioned in the reservation terms, logic alone dictates that the Indians and the United States Government, when the Wind River Indian Reservation was created, intended to reserve water for the Tribes. The water was a necessary commodity. Without water, the reservation could never have accomplished it's prime purpose: the development of agriculture. Much of the reservation land was arid. The water was needed for irrigation and was essential to the raising of crops. Without water most of the land would have been useless.

In support of this reasoning, reference is made to *Winters v. United States*, 207 U.S. 564 (1908) in which the Supreme Court established that the United States,

when it creates an Indian Reservation, impliedly reserves water for needs of the reservation.

In *Winters*, the Gros Ventre and other Indians had, by treaty, ceded to the United States land situated in Montana territory in exchange for their settlement on the Fort Belknap Reservation. The treaty did not expressly reserve water rights. However, the Indians and their agent had appropriated water for use in agency buildings and on land in connection therewith and for use on some 30,000 acres of land in the reservation, and non-Indians contested that appropriation. The Court held that water was reserved by implication in the treaty, inasmuch as water was necessary for the use of the Indians.

> The Indians had command of the lands and the waters (before the signing of the treaty)—command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock," or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?
>
> By rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians.
>
> That the Government did reserve them (water rights) we have decided, and for a use which would be necessarily continued through the years.
>
> Subsequent U.S. Supreme Court cases have reaffirmed *Winters*.

In *Arizona v. California*, 373 U.S. 546 (1963) the Master found both as a matter of fact and law that when the United States created Indian reservations or added to them, it reserved not only land but also "the use of enough water . . . to irrigate the irrigable portion of the reserved lands."

In answer to the argument made by Arizona that there was a lack of evidence showing that the United States in

establishing the reservation intended to reserve water, the Court said:

> The question of the Government's implied reservation of water rights upon the creation of an Indian Reservation was before this Court in *Winters v. United States* . . . decided in 1908. Much the same argument made to us was made in *Winters* to persuade the Court to hold that Congress created an Indian Reservation without intending to reserve water necessary to make the reservation liveable. The Court rejected all of the arguments.
>
> The Court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless. *Winters* has been followed by this Court as recently as 1939 in *United States v. Powers*. . . . We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian reservations were created.

The Wyoming Supreme Court in its 1955 decision of *Merrill v. Bishop*, 74 Wyo. 298, 287 P. 2d 620 (1955) which involved the water rights of non-Indian purchasers of lands originally included in the 1868 Wind River Indian Reservation, said:

> It must, of course, be admitted that according to the holding in *Winters v. United States*, *supra*, the water rights appurtenant to the Indian Reservation here in question, were reserved to the Indians by the Treaty of 1868.

The Court having found that a reserved water right does exist in favor of the Tribes, now confronts the questions that the following issues present:

1. What was the purpose of the reservation when established, and is the primary purpose standard

to be used in determining what limitation may be applied to a reserved right doctrine?

2. To what reservation land does the reserved right apply?

3. What is the proper measurement for the reserved right determination and its application to future needs?

4. Does a reserve right apply to groundwater?

5. What is the amount of water and from what source will the reserved right be given?

To answer such issues, this Court feels that it becomes necessary to consider the actions of the United States both at the time the Reservation was established and during the period of time when the people were settling in the West. After all, the United States was encouraging the settlers to settle in the West which included the Big Horn Basin. Settlement was encouraged through passage of Congressional acts, the most significant being the Homestead Act, Desert Lands Act and the Carey Act. The western lands made available for settlement by those acts were arid, and the fulfillment of the settlers' hopes of farming was entirely dependent an having water for their canals, irrigation ditches and reservoirs.

Following the settlement of non-Indians in the Big Horn Basin, came the establishment and development of cities and towns and then followed the starting and building of industries, all of which required the securing of water rights from the State of Wyoming in accordance with the State water appropriation statutes. For over 100 years non-Indians continued to develop and build in this manner. No attempt was made to thwart these efforts either by the Tribes or the United States, their trustee. Such work and diligence by non-Indians to establish homes and settlements cannot be lightly dismissed or disregarded.

Also to be considered should be the passage of the McCarran Amendment which implies a general policy of deference to state water law.

Thus, the intent of Congress should not only be considered by this Court in the case of the Tribes when they settled on the Reservation but the intent of Congress has to be considered when one looks at the settlement of the Big Horn Basin by the non-Indians.

This Court, in contemplating such, relies on the "sentivity doctrine" as established by the United States Supreme Court, and the doctrine of equitable estoppel.

In *United States v. New Mexico*, 438 U.S. 696 (1978), the United States Supreme Court states that the implied-reservation doctrine must be applied with sensitivity to its impact upon those who have obtained water rights under State law. Justice Rehnquist, speaking for the majority, stated:

> When as in the case of the Rio Mimbres, a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators. This reality has not escaped the attention of Congress and must be weighed in determining what, if any, water Congress reserved for use on the national forests. *Id.* at 705.

Justice Powell, speaking for the minority, made this a unanimous view of the court when he stated:

> I agree with the Court that the implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and to Congress' general policy of deference to state water law.

Although the facts of *New Mexico* dealt with national forests, the principles enunciated in the case have been held to be equally applicable to Indian reservations. *Colville Confederated Tribes v. Walton*, 647 F. 2d 42 (9th

Cir. 1981) (which will be discussed in the part of this decision on future agricultural acreage.)

For the above stated reasons, the Court feels compelled to apply a more strict interpretation of the reserved right theory than that applied by the Special Master.

Purpose

Not only are the Tribes making a claim for a reserved water right for the purpose of agriculture but in addition thereto are making claims on the surface and groundwater for the following multi-purposes:

a. Maintenance of aesthetic values and wildlife habitat

b. Livestock

c. Mineral development and associated industrial activities

d. Municipal

e. Commercial and domestic

f. Instream flows for preservation of optimum fish habitat

To say now that the utilization of reserved water is mandated to fulfill the above-stated multi-purposes as claimed by the Tribes would truly be illogical and inconsistent with the purpose for which the Reservation was created.

To determine the purpose for which the Wind River Indian Reservation was created, it is first necessary to examine the document by which the Reservation was created. That document is the Treaty of July 3, 1868, the Treaty of Ft. Bridger, concluded between the Shoshones and the Bannocks and the United States. (Attached hereto and marked Appendix A and by this reference becomes a part hereof.) Article II of that Treaty, which

was ratified by Congress on February 26, 1869, established the Wind River Indian Reservation. On the very face of the Treaty, it is clear that its purpose was purely agricultural. Like other reservations of the era, the Wind River Indian Reservation was established to convert the Indians thereon from a nomadic people dependent upon hunting to an agrarian people whose livelihood would be earned by farming.

Article VII of the Treaty expressly confirms the Reservation's singular, and hence primary, purpose as an agricultural reservation. It states:

> In order to insure the civilization of the tribes entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on *said agricultural reservations*, and they therefore pledge themselves to compel their children . . . to attend school. . . . (Emphasis added)

No other statement in the Treaty assigns any other purpose to the Reservation. In fact, the remainder of the Treaty is fully consistent with Article VII.

Article VI of the Treaty authorizes allotments to Indians for "farming" purposes. The head of the family received 320 acres, minors under eighteen, 80 acres. Article VIII states that, when an allotment was selected, an allottee who farmed it in good faith would receive seeds and agricultural implements for three years. Under the terms of Article IX, the United States agreed to pay each Indian farming a $20 annual stipend, but only $10 to "roaming" Indians. Article XII established a $50 annual prize to the ten best Indian farmers. No other parts of the Treaty contain any reference to or encouragement of any other occupation or pursuit.

The United States and Tribes have focused their attention on the phrase "permanent home" contained in Article IV of the Treaty, to the exclusion of the Treaty's other portions. They contend that this one phrase vastly

expands the purposes of the Wind River Indian Reservation. Their contention takes the phrase "permanent home" out of context. Article IV reads:

> The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservation named, that *they will make said reservation their permanent home, and they will make no permanent settlement elswhere* . . . (emphasis added)

On its face, Article IV does nothing more than provide that the Indians must live permanently on the Wind River Indian Reservation and not elsewhere. They are to make the Reservation their "permanent home" as opposed to establishing a "permanent settlement elsewhere." Thus, Article IV defined the duration of the Treaty restrictions and limits the right of the Indians to move elsewhere as a Tribe. It does not define the purpose of the reservation. The purpose of the "permanent home," i.e., the Wind River Indian Reservation is, rather, expressly defined by the sections of the Treaty and more particularly described as Articles VI, VII, VIII, IX and XII.

In so holding, the Court follows the reasoning of the many cases which have considered the purpose of "permanent home" reservations. The most detailed analysis of the effect of the permanent home language is found in *Colville Confederated Tribes v. Walton, supra.* In *Colville*, the Ninth Circuit was faced with the task of defining the purpose of the reserved right it found to exist on behalf of the Colville Reservation in Washington. The Court recognized that the Colville Reservation had been created as a permanent home, but that the "general purpose, to provide a home for the Indians, is a broad one." The Court went on, as has this Court, to define the *specific* purpose of the Colville Reservation by reference to the document creating it, the circumstances of its creation, and the history of the Colville Tribe. In

doing so, the *Colville* Court found that the reserved right for the Reservation existed, *not* to serve the general purposes implicit in the permanent home language, but rather to serve the agricultural and fishing purposes of the Reservation only. The Court quantified the reserved right *only* in terms of those specific purposes. While the specific circumstances of the Wind River Indian Reservation do not comprehend a fishing purpose in addition to agriculture, the Court agrees fully with the analysis in *Colville.*

Other cases have also decreed reserved rights for "permanent home" reservations. Interestingly, one of these was *Winters v. United States, supra,* which decreed a reserved right for the Ft. Belknap Reservation for irrigation purposes only. Every other case has followed suit and limited any reserved right decreed on behalf of permanent home reservations to agricultural, generally irrigation, purposes. *United States v. Powers,* 308 U.S. 527 (1939) (Crow Reservation); *Skeem v. United States,* 273 F.93 (9th Cir. 1921); *Hibner v. United States,* 27 F.2d 909 (D. Ida. 1928); (Ft. Hall Reservation); *Anderson v. Spear-Morgan Livestock Co.,* 79 P. 2d 667 (Mont. 1938) (Crow Reservation); *United States v. McIntire,* 101 F. 2d 650 (9th Cir. 1939) (Flathead Reservation); *Tweedy v. Texas Co.,* 286 F. Supp. 383 (D. Mont. 1968) (Blackfeet Reservation).

The Wind River Indian Reservation is a permanent homeland for the Indian thereon. That fact alone does not define its purpose. The sole primary purpose of the Wind River Indian Reservation, the one purpose for which a reserved right can be quantified, must be defined by the Treaty as a whole. That purpose was agricultural,, to convert the Indians from a nomadic to an agrarian people.

The Court considers it significant that the reservations were not designed as "mining", hunting or fishing" or "commercial" reservatio s. The purpose was designated as agriculture.

In support of the Tribes' claim for a sufficient stream flow for fisheries, they have cited the following cases, to wit: *Colville Confederated Tribes v. Walton, supra,* and the *Menominee Tribes of Indians v. United States,* 391 U.S. 404 (1968)

While this Court does not feel that it is necessary to address this issue by reason of its holding that the sole purpose of the Reservation was agriculture, the Court, as an aside, is of the opinion that the cited cases are clearly distinguishable from the instant case.

In the *Colville* case, the Tribe traditionally fished for both salmon and trout. Fishing was of economic and religious importance to them. The case indicated that the Tribe was deeply involved in the commercial business of fishing. In the instant case the only involvement by the Tribes is selling licenses to the public to fish on the Reservation. The Tribes have not shown that they are dependent upon fishing for a livelihood nor has it been an historical part of their traditional life style.

In the *Menominee* case, the facts involved some members of an Indian tribe being prosecuted in the Wisconsin State Court for violating Wisconsin hunting and fishing regulations. The United States Supreme Court held that the Tribe had reserved hunting and fishing rights which differs from the case before this Court where the Tribes are claiming water in specific amounts to maintain a stream flow for fishing.

The Court does therefore reject any reserved water right for fish flows since they do not constitute a primary purpose of the Wind River Indian Reservation.

It appears to the Court that the Tribes and the United States take a somewhat anomalous position as to the Tribes' rights to the water when they contend the Tribes are entitled to an established water right in and to surface and groundwater for not only present agriculture, domestic, commercial, municipal, wildlife, fisheries and

aesthetic uses but also such a reserved water right with an 1868 priority date for all such uses in the future. They project the uses into the future to the year 2020.

But to carry these extended demands one step further, this Court is faced with the additonal request of the Tribes that the decree in this case be open-ended so that the Tribes could make further enlargement of their claims at any time in the future.

This Court not only considers the present demands as being unreasonable but when it considers the totality of what the Tribes are requesting, it demonstrates to the Court an avaricious appetite on the part of the Tribes for practically all of the water in the Big Horn River System.

This Court by its decision is obligated to define the respective rights of the parties so there is no question as to what those rights are. This applies not only to the Tribes but the other water users as well. And this Court will not be associated with any ruling which creates a gossamer haze over the entire Big Horn River System.

Ranchers and farmers wishing to establish a family home and security for themselves and their descendants would be understandably reluctant to invest money and labor in land over which hung the specter of future water claims by the Tribes.

This Court, thus calculates the Tribes entitlement to a reserved water right, with a priority date of 1868, based on the purpose of agriculture (which term includes livestock use and domestic use) and denies such reserved water right for other multi-purpose uses as claimed by the Tribes. The Court by such finding does not intend to dictate to the Tribes that they are restricted as to the use of said reserved water only for the purpose of agriculture, inasmuch as it recognizes that it cannot tell the Tribes how they must use water that comes under a reserved water permit. If the Tribes desire to use so

much of their water for other purposes, they may do so. However, the said uses of the reserved water right will be limited to use within the boundaries of the Reservation. The Court does not see any purpose of the Reservation being fulfilled by allowing use of the reserved right water off the Reservation.

The Tribes are advocating that the Court is without any authority to dictate to the Tribes not only restrictions as to uses of the water but also restrictions on the leasing, selling or even giving of the water for exportation from the Reservation. The Court does not feel that the purpose of the Reservation will be served by allowing for any reason the use of the water off the Reservation, and so holds that the water if leased, sold or given, is to be used only within the boundaries of the Reservation.

Land to Which Reserved Rights Apply

This case presents a factual situation which this Court has not encountered in any similar cases. The Court is aware that this is not a boundary case (indeed, the reservation boundaries have been stipulated to by the major parties) nor is it a title case. However, as Tribal land is the basis of measurement for the reserved rights doctrine, Tribal ownership of land is an issue.

The history of the Wind River Indian Reservation shows that the size of the original reservation as set out in the Treaty of 1868 was reduced by several sales of land to the United States by the Indians, first in 1872 (the Lander Purchase) and then in 1896 (the Thermopolis Purchase.) In the Second McLaughlin Agreement (also called the 1905 Act) a large tract of reservation land was ceded to the United States. The land that remained in Tribal ownership was called "the diminished reservation." A part of this ceded land was settled by non-Indians through various Congressional settlement acts. What was not sold was held by the United States in trust for the Tribes and later restored to them. Some of

the ceded land settled originally by non-Indians has since been reacquired by the Tribes, as have certain tracts of the "diminished reservation" land, owned in fee by Indians, but later sold to non-Indians. This land has been identified in this case as "reacquired land". It is the contention of the Tribes that once this land was reacquired by the Tribes, it re-attained its Indian status for purpose of a reserved water right with an 1868 reservation priority date.

The Tribes claim that originally all Reservation lands were owned by them, with a *Winter's* doctrine right for all irrigable reservation lands. They say that no statute —including the 1905 Act—removed their water rights to lands homesteaded by non-Indians. It is the position of the Tribes that when such lands are reacquired, the original reservation purpose is again effectuated, and reserved water may be put to use on these lands on the same basis as other lands of the Tribal homeland.

This Court cannot accept that position. The reserved rights doctrine is a unique Indian right. It does not extend to subsequent purchasers of Indian land.

The U.S. District Court in *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (1978) dealt with the question of whether a non-Indian grantee of an Indian allotment succeeds to his Indian grantors reserved rights.

The Court analyzed the rationale for development of the reserved rights doctrine and the recent Supreme Court opinions concerning the concept of reserved rights generally:

> An analysis of the rationale for the reserved rights doctrine convinces this Court that the implied reservation of waters of Indian reservations should be limited to Indian ownership. *Winters* doctrine rights were reserved to members of the Indian tribe living on the reservation.

> Water was impliedly reserved to ensure that the lands intended to be permanent homelands for the Indians would have the necessary water to fulfill that purpose. When title to Indian lands passes into non-Indian hands, the purposes for which the reserved water rights are implied no longer exists. It therefore seems logical to conclude that reserved water rights on Indian reservations are limited to Indians.

The reserved water right is not a right which hovers above original Reservation land, descending and attaching to the land, so to speak, when the land is reacquired by the Tribes from non-Indians. Nor is it a vested Tribal right which only manifests itself when the land in question returns to Tribal ownership. It is a reserved right given to Tribes to effectuate the purpose of the reservation—to make a homeland for them. When the Tribes, for whatever reason, chose to diminish their homeland by selling land, they relinquished the reserved water right for that land.

Even the United States sustained such a position when it filed on September 4, 1980, "Reply of the United States to Wyoming's Response to the Claims for Water Rights of the United States." The United States said on page 15:

> "All of the reserved water rights for the Wind River Indian Reservation have a priority date of 1868 *except* for those which are *for use of lands sold to non-Indians and later* repurchased." (emphasis added)

It is this Court's view that when Indian reservation land left Indian ownership or United States Trust status, it lost its original reservation land status for purposes of a reserved water right priority date of 1868. That land entered the free market place. The non-Indian purchaser did not acquire an Indian water right when he purchased the land. He applied for and acquired a State water right with an applicable priority date. If the non-Indian pur-

chaser did not have a state permit, the earliest priority date which could be given to that water right in equity, would be the date the non-Indian acquired the land and began putting the water to beneficial use. When the Indian later reacquired this same land from the non-Indian, the Indian purchaser acquired what the non-Indian owned, that is, he acquired land with a water right priority date later than 1868.

The Tribes have made an eloquent argument that they are trying to rebuild their land and their efforts should not be defeated by a narrow interpretation of this issue. This Court is aware of that fact. It accepts as law that the Indians have a reserved right with a priority date of 1868 (the senior water right in Water Division No. 3) for all land continuously held by Indians or the U.S. in trust for Indians. That also includes the land ceded to the United States in 1905 but never sold to non-Indians. On this point, the Court concurs with the conclusion of the Special Master that this land was held in trust for the Tribes by the United States and never lost its Indian status.

However, once the Indians, regardless of the historical facts which compelled them to do so, entered the market place to sell or buy reservation land, they by choice began dealing on an equal footing with non-Indians in the region, who were also trying to make homes and build settlements.

Therefore, this Court holds that July 3, 1868 is the priority date for the land continuously held since the date of the Treaty by Indians—Tribal or in fee—or the United States in trust for Indians, and that Tribal land which left Indian ownership but was later reacquired by the Tribes has a reserved water right priority date of whichever is earlier: when the land left Indian ownership and was purchased by a non-Indian, or the date of the applicable state water permit.

The Tribes are not entitled to a reservation reserved water right for those lands outside of the stipulated

boundaries of the Wind River Indian Reservation known as the Arapahoe Ranch and the Padlock Ranch that have been purchased and are held in trust by the United States for the Shoshone and Arapahoe Indians.

The Court holds that the Tribes are entitled to a water right as of the date of the applicable state permits, but the confirmation of the state water permits owned by the Tribes which apply to these said lands will be considered in the third phase of this case.

Proper Measurement for the Reserved Right Determination

The Court now must determine the measurement of the water right it has awarded to the Tribes. Initially, the United States on behalf of the Tribes, and the Tribes on their own behalf, made a total request for Indian reserved rights water of more than 1,500,000 acre feet per year. The Special Master, in his conclusions, did not support that request.

The claims of the United States and Tribes fall into two main categories: water for lands now and historically irrigated, called the "historic" acreage, and water for lands which would qualify now or in the future as practicably irrigable acres, called the "future" acreage.

Historic use of water for irrigation includes water for trust land unadjudicated but currently in use, adjudicated trust lands, lands previously irrigated but currently idle, lands not in use but irrigable from existing canals, and Indian fee lands.

The State took the position that virtually none of the historically irrigated lands should be accorded a reserved water right because the United States and Tribal experts failed to qualify it as practicably irrigable acreage.

The Court accepts as reasonable the Special Master's presumption of irrigability for "historic" lands, and notes

that when expert testimony successfully rebutted this presumption, the Master made corresponding adjustments in this findings.

Except where the Court deviated from the Special Master's Findings and Conclusions as to after-acquired land and except where this Court differs by reason of the variance created as a result of its holding that reservation reserve right is applied solely to agriculture land, the Court accepts and adopts the Special Master's conclusion as to which "historic" land should be awarded a reserved right.

While this Court has quantified the Tribes reservation reserved water right of 1868 only for certain historic acreage and then only for the sole purpose of agriculture, the Court is now presented with the perplexing issue of the application of the reserved rights to future acreage which would meet the test of practicably irrigable acres.

It is quite apparent from the report that the Special Master, in making his award to the Tribes of 188,977 acre feet per year with a priority date of 1868 for future agricultural development, considered that such was a complex issue which the Court should approach with caution. This is evidenced by Article VI of his recommended decree in which he made provision for limitation of the five awarded future projects. Reference is made to his Report at page 342:

> Provided further, that should the decision of the Tribes be to proceed with future irrigation projects in lieu of other uses, then and in that event not more than ten percent (10%) of the total acreage of the said future projects can be put into effect in any given decade, unless upstream storage facilities shall have already been constructed to provide water for the additional acreage of said future projects.

The Special Master's reasons for his imposed limitations are (1) that the delay in building the five projects is to

avoid the possibility of economic damage to other water users in the District and (2) to encourage the parties to enter into negotiations for upstream storage.

The Tribes attack these two reasons given by the Special Master by submitting that both contradict the 1868 priority that the Tribes are entitled to. In discussing the limitations to avoid the possibility of economic damage to other water users, the Tribes rely again on the *Winters* case. But in that case, the Court was dealing with "historics" alone which distinguishes the *Winters* case from the instant case in which the Court has both the historic and future claims to quantify.

This Court is quite cognizant of the United States Supreme Court ruling in *Arizona v. California*, *supra*, whereby the Court ruled that sufficient water is reserved to satisfy the future as well as present needs of the Indians. But that court was not faced with the factual situation that confronts the Court in this case. That is that the Tribes are demanding a reservation reserve right for seven agricultural projects involving 235,000 acre feet of water, without any limitation imposed thereon. This demand is made after the passage of 115 years of time and the expenditure of millions of dollars not only by the non-Indians, the industries and the cities and towns of the Big Horn Basin, but also by the United States Government in promoting and helping in the settlement of the Big Horn Basin.

The Court now discusses the issue of whether the Tribes are entitled to a reservation reserve right in the future acreage.

Future needs of a Tribe are determined by the practicable irrigable acreage test, promulgated by the U.S. Supreme Court in *Arizona v. California* in 1963. The Supreme Court said:

> We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the

> future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acres on the reservations.
>
> We have concluded . . . that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.

The practicable irrigability test was used by the Special Master in the instant case to determine which "future" acreage qualifies for the reserved water right. However, since the Court in *Arizona v. California* did not define practicably irrigable acreage, the State, the United States and the Tribes agreed upon one definition, to wit:

> Practicably irrigable acres are those acres susceptible to sustained irrigation at reasonable costs.

A second definition was proposed by the Tribes but was not used by the Special Master.

The Court accepts the Special Master's use of the stipulated definition of practicably irrigable acreage in his evaluation of "future" land to be awarded a reserved right.

As to future agricultural development, the Special Master analyzes the months of testimony by both sides and concludes that there are 48,520 acres that the United States and the Tribes have proved to be practicably irrigable that have never been put into irrigation. The Special Master then finds specifically that the Tribes are entitled to a diversion of 188,977 acre feet per year measured by those acres with a priority date of 1868.

The 48,520 acres of practicably irrigable land found by the Special Master were within five proposed irrigation projects, known in the trial and referred to in the Special Master's report as the five "future projects," as follows: North Crowheart (34,993 acres awarded); South

Crowheart (4,238); Arapahoe (3,437); Riverton East (3,442) and Big Horn Flats (2,410).

Two additional future projects claimed by the Tribes are Big Horn Flats Extension and Stagner Ridge for which the Special Master awarded no water.

This Court being of the opinion that the five proposed irrigation projects are in keeping with the primary purpose of the reservation, to wit: agriculture, accepts the special Master's award of a reservation reserved right for the said five projects and sustains the Special Master's denial of any award for Big Horn Flats Extension and Stagner Ridge projects.

The United States and Tribes have urged the Court to take into consideration population growth and the Special Master in his report has made certain findings and conclusions contemplating such growth. In view of the fact that the Court has held that the purpose of the Reservation is agriculture, and has made an award for "future" agricultural projects, it has, by doing so, also made a provision for population growth.

The State has advocated that the application of the doctrine of equitable estoppel to prevent the United States and the Tribes from claims inconsistent with the water rights acquired by state law by the United States on behalf of the Tribes. While this Court agrees with the State that the modern trend is to permit estoppel against the Federal Government, the Court will not consider the estoppel doctrine on the issue of State-awarded-rights versus the reservation reserve water rights. In fact, the Court considers said issue moot by reason of its previous rulings in this decision and further the application of the doctrine in such an instance would be harsh and inequitable.

But the Court will consider the equitable estoppel doctrine in the issue of the Tribes' future awarded projects.

The present day status of the law of estoppel as applied to the Federal Government is summarized in *United States v. Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973). The Court reviewed the leading cases of *Moser v. United States*, 341 U.S. 41 (1951), *Schuster v. C.I.R.*, 312 F.2d 311 (9th Cir. 1962) and *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970) and stated:

> The Moser-Brandt-Schuster line of cases establish the proposition that estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel. (citation) This proposition is true even if the government is acting in a capacity that has been traditionally described as sovereign (as distinguished from proprietary although we may be more reluctant to estop the government when it is acting in this capacity. *Id.* at 989. (footnote omitted).

The United States can indeed be estopped, provided the conditions mentioned in *Lazy FC Ranch* are met: (1) the government's conduct threatens serious injustice and (2) the public interest would not be "unduly damaged" by estoppel. The next issue is whether the elements of equitable estoppel exist in this case.

Concerning the elements of estoppel, the party asserting estoppel must show: (1) lack of knowledge of the facts; (2) no means of discovering the facts; (3) reliance upon the actions of the party to be estopped; and (4) a change of position. *Cheyenne Dodge, Inc. v. Reynolds and Reynolds, Inc.*, 613 P.2d 1234 (Wyo. 1980).

The analysis necessary to estop the Federal Government requires two steps. First, the elements of estoppel must be satisfied. The party seeking to invoke estoppel lacked both knowledge of the facts and the means to obtain the facts and relied to his detriment on the other

party's acts. Second, in order to estop the Federal Government there must be serious injustice and no undue damage to the public interest.

The case at bar is replete with examples of the unanswered questions existing in the law of reserved water rights. Using different definitions of such concepts as irrigable, arable, economically feasible, the parties have arrived at vastly different figures of the amount of "practicably irrigable acres." Thus, even if residents of Wyoming knew of the doctrine of reserved water rights, they could not have known the quantity of those rights or the impact on their own rights.

Without a recognizable threat of significant harm, the people of Wyoming could not have known of the sizable reserved water claims asserted here. They had no means of discovering the facts. Thus, the first two elements for estoppel are met: no knowledge and no means of knowledge.

The detriment in this case is readily apparent. The United States has asserted claims for water in excess of the amount available in many regions in the Big Horn Basin. Holders of state-awarded water rights will find their formerly valuable water rights worthless. They will be unable to continue their ranching and farming operations.

The Court has previously stated in this discussion on estoppel that it would not consider the doctrine as applied against the United States and hold that the United States is estopped to claim any reservation reserved water rights because of its past actions in filing for state water permits. But the Court will consider the practice of the United States in filing for state water permits when such actions are considered together with all the other acts of the United States in misleading the individual water users to assume that the United States would not later assert future rights with a 1868 priority date.

In reliance on the United States' action, individuals invested in the construction of irrigation works and in their ranches and farms. None of this would have happened had the water users known that the United States had a superior right to take all their water.

A case in point is the City of Lander, which relied upon the Federal acts and conduct of the Federal Government in the last decade. It undertook the construction of a new water supply treatment system to serve the City, the Lander hospital and the State Training School, which provide valuable services to Indians and non-Indians alike.

In compliance with the Safe Water Drinking Act and other Federal laws and regulations, the City of Lander hired firms to design and construct a supply and treatment system and to petition the State Board of Control to consolidate its points of diversion to one point of diversion on the Middle Fork of the Popo Agie to be the most economically and technically efficient point of diversion and delivery system that could be designed, constructed and operated. The City of Lander relied upon the past and current actions of the Federal government as to the stability of their water rights in seeking and receiving Federal participation in the amount of a $2.5 million EDA grant and a $.5 milion FHA grant for the design and construction of the system, which said Federal participation amounted to approximately one-half of the cost of the system. Testimony in the case documented the City's reliance upon historical diversion.

Hence the third and fourth elements of estoppel are satisfied; reliance and damage.

The remaining step in the analysis is to determine whether the Federal Government should be estopped.

Under *Lazy FC Ranch* the Federal Government can be estopped if two conditions are met: (1) the government's conduct threatens to work a serious injustice and (2) the public's interest would not be unduly damaged.

With respect to the first condition, no extended discussion is necessary on the point that in the West to take away one's water is a serious matter. Investments and livelihoods depend on state-awarded water rights. To eliminate these rights by permitting the United States to assert claims inconsistent with its earlier acts is a serious injustice.

The second requirement stated by the *Lazy FC* decision is that no undue damage occur to the public's interest by application of estoppel. What the *Lazy FC* court apparently meant by this second requirement was that estoppel cannot be used to cripple the government's ability to carry out its functions. One of the cases relied upon by *Lazy FC* was *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970), where estoppel was successfully asserted against the Secretary of Interior because of the Department's mishandling of an oil and gas leasing. The Secretary in that case was concerned that the "estoppel doctrine can have a deleterious effect on administrative regularity." *Brandt*, 427 F.2d at 57.

The injury to residents who relied on the United States' actions is so serious that estoppel can, and should be, used to prevent the harm caused by the United States' inconsistent actions.

The settlement of the West would have been greatly altered if the settlers had been told than what the United States asserts now: that necessary water had already been reserved for the use of Indians. The inconsistency between the federal acts of the previous century and the federal future claims before the Special Master form the basis for the application of the doctrine of equitable estoppel.

While this Court has held, as heretofore evidenced in this decision that the awards of reservation reserve rights for the five future projects should be granted, it is convinced that some limitation has to be placed on the

construction of same to alleviate the damage that could be caused to the other water users.

The Wyoming Supreme Court has stated "While Indian rights are to be regarded favorably, that should be done within reasonable limits". *Merrill v. Bishop, supra,* at page 314.

The United States Supreme Court has further stated that in the case of a fully appropriated river, "Federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for a water-needy state and private appropriators." *United States v. New Mexico, supra.*

Even the Tribes, in their "Exceptions To The Special Master's Report," recognize that various measures to take care of the other water users may be considered in the future. Reference is made to p. 18 of the Exceptions where the Tribes state:

> No one expects the Tribes to build all five, or seven projects immediately. To obtain money from Congress to build the projects might require political cooperation from the State. Various measures to take care of junior water rights holders may be the price of any such cooperation.

As this Court indicated at the beginning of its discussion on the future projects, the Special Master recognized the problem and imposed limitations.

In response to same, the Tribes in their Exceptions on p. 19, state:

> Thus, there is no legal or evidentiary basis for the Special Master's limitations, and the limitations themselves are beyond the intended or lawful limits of this litigation, and cannot properly be adopted by the Court.

While the Court agrees that the Special Master's finding of a limitation of only ten per cent of the total acreage

of the five future projects in any given decade may be unreasonable and not economically sound, it does agree with the Special Master's recommendation of upstream storage.

The Tribes made quite cogent argument that the Court would be wrongfully placing the burden on the holders of the senior water rights if it imposed the condition that upstream storage has to be in place before the construction of the five future projects could be started. But because of the uniqueness of this case in that 115 years have passed without any overt action taken towards development of lands within the five future projects, and the actions of the United States which give rights to the application of the doctrine of equitable estoppel, this Court is going to impose the limitation that upstream storage has to be constructed and in place to provide water for the additional acreage of each of the five future projects before construction can be started on that project.

While the Court is aware that some cases hold that estoppel is not available to defeat Indian treaty rights, it distinguishes such holding from the application of the doctrine in the instant case, when the Court is only using the doctrine for the purpose of imposing a condition and not for the purpose of defeating treaty rights.

In the most recent handling of the *Arizona v. California* case by the United States Supreme Court, —— U.S. ——, No. 8, Orig., Slip Opinion (March 30, 1983) the Supreme Court made a decision which buttresses this Court's ruling on the five future projects and this Court's imposition of the limitations thereon. The Supreme Court strongly indicates that it too was concerned about the effect of additional reserved water rights being given to the Indians to the detriment of other water users. That indication is noted on page 14 and 15 of the March 30, 1983 decision. Justice White states:

> . . . but, due to the high priority of Indian water claims, an enlargement of the Tribes' allocation can-

not help but exacerbate potential water shortage problems for these projects and their States.

If the Tribes feel that this limitation injures them or their water rights as granted by the Treaty of 1868, then perhaps they should consider making application for compensation from the United States Government for their loss.

Many of the parties, in their Objections to the Special Master's Report, have stated that the Special Master's recommended decree does not contain sufficient detail for its own administration. The State argues the decree does nothing to relieve the uncertainty caused by reserved water rights since other water users cannot determine the location of the diversion points, the land to be irrigated, the rate of diversion or the allowable depletions from the river system associated with these water rights.

The Court states again the premise that the determination of "historic" acreage and "practicably irrigable acreage is used *only* as a measuring device to calculate the Tribes present and future needs. The requirements of an adjudication of a reserved right are different than those of a state awarded water right. The granting of a reserved right does not limit the usage of the water nor does it compel the Tribes to use the water on any particular tract of land. When the Tribes determine where and how they wish to use the water granted in this decree, they will inform the proper authorities who will then be able to make the specific determinations which are necessary for administration of a water right.

If the Tribes, however, choose to change the use of their water from the amount contemplated for agricultural use, they are limited to that amount as would have been consumptively used for irrigation.

The parties have all urged a modification in the Special Master's ruling which limits non-agricultural consumptive use of waters to no more than 25 percent of the annual

diversion requirements. The definition suggested by the parties and heretofore adopted by the Court is that the change of water right is limited to the amount of water historically consumed in benefical use, being "net irrigation requirement", *Basin Electric Power Coop. v. State Board of Control*, 578 P. 2d 557, (Wyo. 1978).

The Master provided in his recommended decree that the State Engineer should have the right to monitor diversions for irrigation and stock watering.

The Court finds that effective administration of both Indian and non-Indian and Federal and state-awarded water rights requires a single administrative system and agency. A nonunified and inconsistent dual system of administering Federal and state-awarded water rights would introduce inefficiency and uncertainty to the detriment of all water users and contrary to the legislative intent that led to the enactment of the McCarran Amendment.

The Court finds that the State Engineer has responsibility for the administration of all state-awarded water rights in Division 3 as well as the Indian and Federal non-Indian water rights.

In the *Jicarilla Apache Tribe v. the United States*, 601 F. 2d 1116 (1979), the Tenth Circuit Court implies state administration in citing *Montoya vs. Bolack* (p 1135) where the Court said:

> Congress itself has recognized that the Indians must, at some time, become an integral part of the country and gradually be assimulated into society.

Reserved Right Application to Groundwater

Groundwater is nature's cache for the future needs of mankind. Surface water, replenishable and measurable, can be apportioned among users. In any year, wet or dry, only that which is available can be divided. Groundwater

is not so easily quantified. Although a principal source of groundwater is surface water flowing over the alluvium deposits, nonetheless, the depth and extent of the groundwater supply is still largely unknown. The question the Court must answer here is whether to extend the reserved right doctrine to include groundwater.

The Special Master in his report stated that there was little evidence or argument regarding groundwater. Indeed, the only United States Supreme Court case which deals with the subject is *Cappaert v. United States*, 426 U.S. 128 (1976), cited by the several parties to support opposing positions.

The Court has already held that by virtue of the *Winter's* doctrine, the Tribes have a reserved water right to satisfy the purpose of the Reservation. As one of their claims for this reserved right, the United States and the Tribes assert that the Tribes own the water beneath the Reservation. Neither federal law, however, nor the law of the State of Wyoming support this proposition.

The reserved right doctrine was created and has been defined by decisions of the United States Supreme Court. That body has never extended the doctrine to include a reserved water right in underground water. Rather, it has scrupulously avoided doing so.

In *Cappaert v. United States, supra,* the question presented was whether the reservation of Devil's Hole in Nevada as a national monument reserved federal water rights in unappropriated water.

Devil's Hole is a deep limestone cavern in Nevada. Approximately 50 feet below the opening of the cavern is a pool which is a remnant of the prehistoric Death Valley Lake System. In 1952, a 40-acre tract surrounding Devil's Hole was made a part of the Death Valley National Monument. The 1952 Proclamation noted that Death Valley was set aside as a national monument "for the preservation of the unusual features of scenic, scien-

tific, and educational interest therein contained." The proclamation noted that Devil's Hole is near Death Valley and contains a "remarkable underground pool."

In 1968, the Cappaerts, who owned a ranch near Devil's Hole, made an appropriation pursuant to Nevada law and began pumping groundwater near the monument. That action lowered the water level of the cavern to a point that it was impossible for the pupfish in the pool to breed.

In the case that followed, the District Court and Ninth Circuit Court of Appeals both held that the fundamental purpose of the reservation of the Devil's Hole Pool was to assure that it would not suffer changes from its conditions at the time the Proclamation was issued in 1952. They held that the implied reservation of water doctrine applied to groundwater as well as to surface water.

The United States Supreme Court granted certiorari to consider the scope of the implied reservation of water rights doctrine. While finding a reserved water right on behalf of the pool, the Court was exceedingly careful not to extend the reserved right doctrine to underground water.

> The implied-reservation of water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.
>
> No cases of this Court have applied the doctrine of implied reservation of water rights to groundwater.
>
> Thus, since the implied-reservation-of-water doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.

The Supreme Court had every opportunity to expand the reserved right doctrine in *Cappaert*. In spite of the fact that the Federal Circuit Court decision in the case had attempted to extend the doctrine to include under-

ground water, and in spite of the Supreme Court's nearly unilateral approval of the Ninth Circuit's decision, the Supreme Court refused to approve its extension of the doctrine to underground water.

In *Cappaert*, the Court looked at the purpose of the reservation. Whatever limitations were placed on the Cappaerts' diversions which affected the water level, the Supreme Court did so because of the purpose of the reservation—the preservation of the pool, for one. In the instant case, the Court has already established the purpose of the Wind River Indian Reservation—a homeland with an agrarian way of life for the Tribes.

That purpose has been fulfilled. The Tribes have been given a reserved water right to irrigate historically irrigated acreage and also all the practicably irrigable acreage on the reservation, an established, acceptable measurement of their present and future needs. *Arizona v. California, supra.* The standard used in this case to determine the reserved right is the amount of water necessary to fulfill the purpose of the reservation. The purpose of the reservation is satisfied. This Court does not feel there is any compelling reason to extend the reserved right doctrine to include groundwater.

In the State of Wyoming, ownership of overlying land carries with it no right to underground water. The Wyoming Constitution, Article 8, Section 1, says:

> 1. Water is state property.
>
> The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.

The State applies the doctrine of prior appropriate to underground water. As in the case of surface water, the right to use underground water is acquired solely by placing the water to beneficial use. The Wyoming Constitu-

tion also states in Article 8, Section 3, that "no appropriation shall be denied except when such denial is demanded by the public interest." This gives all state water users the right to appropriate groundwater, and yet is serves as a conservation measure in assuring water is used for the public good. It means that no one has unlimited right to use or mine groundwater without regard for his neighbor.

The Court is cognizant of the fact that Tribes on reservations are not subject to the laws of the state in which they are located. The water rights awarded to the Tribes in this case are not bound by the same constraints as are water rights owned by other state users. However, the Court has ruled that the State of Wyoming owns all groundwater, even that which flows beneath the reservation. Therefore, the Tribes will be governed by the same rules and regulations as others in the State. They must follow the doctrine of prior appropriation and concomitantly, they are afforded equal protection of their rights. If they, or any party, feel that their groundwater supply is being threatened by another, they have full right to bring an action in any court of competent jurisdiction to protect that groundwater suppy. Neither the Tribes nor anyone else has the right to drain the groundwater supply without regard to others.

The Special Master has noted in his report that it has been the policy of the Tribes to drill wells for both domestic and livestock uses, and deeper water wells for secondary recovery of oil in the Reservation's oil fields. He states there is no indication that individual Indians applied for state permits for their domestic wells, but that oil companies operating on the Reservation have, over the years, applied for and received state permits to drill water wells for secondary recovery.

The Court holds that the Tribes have the right to use any water from wells already in place for domestic and livestock purposes and mineral extraction, those "protected" by a State permit and those which are not. How-

ever, in the future, the Tribes have the same right enjoyed by all other residents of the State in the groundwater of the State—the right to make an appropriation for use and enjoyment. There is no reserved right to this water.

Based upon the foregoing, the Court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. The Wind River Indian Reservation, established by Treaty, July 3, 1868, lies within Water Division No. 3 of the State of Wyoming, and its boundaries are agreed to by major parties herein.

2. The boundaries of the Wind River Reservation encompass the lands described in Article II of the Treaty of July 3, 1868, less the lands described by the Lander purchase of 1872 and the Thermopolis purchase of 1896. The boundaries of the Wind River Indian Reservation, and the land included within those boundaries are recorded in the "Stipulation Concerning the Boundaries of the Wind River Reservation" filed by the parties with the Court in this case.

3. Article IV of the Treaty provided that the Indians ". . . will make said reservations their permanent home . . ."

4. Articles II, VI, VII, VIII, IX, XII of the Treaty of 1868 establish that the primary purpose of the Wind River Indian Reservation was an agricultural reservation.

5. Wyoming was admitted to the Union by an Admission Act passed by Congress on July 10, 1890, twenty-two years after the Reservation was established. Section 1 of the Act confirmed the Wyoming Constitution.

6. Article 8 of the Wyoming Constitution addressed water and the prior appropriation system as follows:

"Article 8, Sec. 1. The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.

Article 8, Sec. 3. Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests."

7. No provision in the Act of Admission addresses the Treaty of 1868 or the repeal of any provision of that Treaty.

8. The Act of March 3, 1905, amended, modified and ratified the Agreement of April 21, 1904, commonly known as the Second McLaughlin Agreement, between the United States and the Shoshone and Arapahoe Tribes. Approximately 1,480,000 acres of Reservation land north of the Wind River and east of the Popo Agie were opened to disposal to non-Indians under the provisions of the homestead, townsite, coal and mineral lands laws, or by sale for cash, as provided in the Act. The ceded land is described as follows:

"Beginning in the midchannel of the Big Wind River at a point where said stream crosses the western boundary of the said reservation; thence in a southeasterly direction following the midchannel of the Big Wind River to its conjunction with the Little Wind or Big Popo-Agie River, near the northeast corner of township one south, range four east; thence up the midchannel of the said Big Popo-Agie River in a southwesterly direction to the mouth of the North Fork of the said Big Popo-Agie River; thence up the midchannel of the said North Fork of the Big Popo-Agie River to its intersection with the southern boundary of the said reservation, near the southwest corner of section twenty-one, township two south, range one west; thence due west along

the said southern boundary of said reservation to the southwest corner of the same; thence north along the western boundary of said reservation to the place of beginning."

9. Article III of the 1905 Act provided that a portion of the proceeds from the sale of opened land would be used to take such steps:

". . . as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve."

10. The 1905 Act establishes a trust relationship between the Tribes and the United States, with the United States acting as the trustee for the sale of certain Indian lands to settlers.

11. Indian title to the opened lands was not extinguished until specific plots of land were actually sold or entered, and the Department of the Interior maintained exclusive jurisdiction over grazing on opened lands which were not sold or entered.

12. Between the opening of the Reservation lands in 1905 and when further disposal of lands was discontinued, proceeds realized by the grazing leases on the opened lands were not treated as general revenues to the United States Treasury but were instead paid to or expended for the benefit of the Indian through Tribal accounts.

13. By stipulation of the major parties, all of the ceded or opened land, whether owned by Indians or non-Indians, is within the boundaries of the Wind River Indian Reservation.

14. By June 12, 1914, 128,986.56 acres of the ceded land had been sold, realizing $251,642.97 for the Tribes.

In 1915, the Commissioner of Indian Affairs recommended that further sales be postponed indefinitely; subsequently, the Secretary of Interior so ordered.

15. In 1934, the Secretary of Interior temporarily withdrew further disposition of lands within the area opened by the 1905 Act.

16. On April 17, 1940, the Secretary of Interior, upon finding that restoration of undisposed, ceded lands to Tribal ownership would be in the Tribal interest, ordered lands not disposed of under the 1905 Act restored to the Wind River Indian Reservation.

17. The Court finds that some lands have left Indian ownership and subsequently, have been reacquired by the Tribes.

18. Agriculture and related uses existed on the Wind River Indian Reservation and contributed to the food base for the Indians during much of the latter half of the nineteenth century.

Historic Lands

19. The United States began the presentation of its case with the tesitmony of Ronald Billstein of H.K.M. Associates. The interpretation of aerial photographs made between 1939 and 1979 by United States' experts, was supplemented and checked by field inspection of each tract claimed as historically in use outside of the Federal Irrigation Projects, and by review of assessment records and delivery system maps within the Federal Irrigation Projects.

20. On-site hydrographic verification and soils classification on all lands in the historic land base was done under the direction of Albert Kersich, President of H.K.M. Associates.

21. The United States presented its case on engineering studies and water requirements in adjudicated, un-

adjudicated in-use, and Type VII land claims through the testimony of Thomas Stetson, President of Stetson Engineers. Dr. Woldezion Mesghinna, also of Stetson Engineers, presented similar testimony for the United States concerning the Type VIII land claim.

22. The evidence presented by Thomas Stetson and Dr. Mesghinna was credible and persuasive.

23. Excluding the Upper Wind Unit, the average overal efficiency of the Federal Irrigation Projects is thirty-five percent (35%). Historic overall efficiencies on non-project lands also average thirty-five percent (35%).

24. United States' economic feasibility expert David Dornbusch performed an economic evaluation of each tract of Type VII and VIII lands, in the same manner he evaluated "future" lands.

25. Irrigation of Type VII and VIII lands included in the final totals is economically feasible.

26. A benefit/cost ratio, the present value of returns from the land divided by the present value of the costs necessary to generate those returns, of less than "one" or "unity", indicates economic infeasibility.

27. The irrigation of historic lands in the final totals is clearly feasible.

28. No economic analysis was necessary, nor was one done, on adjudicated or unadjudicated in-use lands.

29. In considering Type VII land and Indian fee potentially irrigable acres, State economic expert James Jacob could not support the State's claim that the benefit/cost ratios of the historic lands study are below unity.

30. The State of Wyoming presented Craig Sommers' testimony to show that 5,017.1 acres of adjudicated lands were nonarable by United States' standards. He did not disprove that water was being beneficially applied to 12,395 acres.

31. The State showed 3,575.9 acres of Class 6 lands within the unadjudicated in-use claim. Class 6 land is that which does not meet the minimum standards or requirements of arability under the land class standards used by the United States experts, and is therefore non-irrigable.

32. The irrigability of another 879 acres of unadjudicated in-use lands was discredited by notes in the logs of United States experts.

33. The unadjudicated in-use totals included 1,778 acres of subirrigated land, which United States expert Billstein admitted was classified nonarable.

34. State witness Sommers pinpointed 55.6 acres more appropriately typed as idle, or Type VII, land.

35. Two parcels within the unadjudicated in-use claim are owned by non-Indians. They total 10 acres.

36. The 34,427 acres claimed by the United States as unadjudicated in-use contains 6,298 acres not entitled to a reserved water right.

37. After modifications made during analysis by Federal experts, the United States' benefit/cost analysis at a 4% real rate of interest showed 7,946 acres feasible out of the original Type VII claim of 8,002 acres.

38. There was a general relaxation of standards used by United States experts in Type VII land classification.

39. The arability conclusions of United States experts for Type VII lands had deficiencies which warranted subtracting the acres from the final totals.

40. Class 4 and Class 6 Type VII lands are too marginal to be awarded a finding of practicably irrigable, and are excluded from the final Type VII totals.

41. Lands which do not have sufficient depth to water table and consequently classify as wet lands, or lands

which are sub-irrigated by seepage from adjoining irrigated lands, should not be considered as practicably irrigable acreage, and are not given a reserved water right.

42. Type VIII lands are within the boundaries of the Wind River Federal Irrigation Projects in the Upper Wind Unit, the Little Wind Unit and Johnstown Unit.

43. Class 4 and Class 6 Type VIII lands are too marginal to be used as a measure for a reserved right.

44. Type VIII lands and lands claimed within the Owl Creek Unit have attributes comparable to future project lands, and were analyzed in the same manner. Acres which could not be irrigated from an engineering standpoint, and those which would not be economically feasible to develop, were eliminated.

45. The assertions of Tribes' expert Higginson regarding Indian fee land were not supported by the record.

46. The diversion requirements developed by United States expert Mesghinna and by Tribes expert Higginson are reasonable.

47. The categories of land termed "historic" herein include numerous farm fields, many a part of federal irrigation projects long established, that are rich and productive and have been the basis of agricultural life of the Reservation for decades. It would be unreasonable to require an economic analysis or benefit/cost ratios on these lands. The presumption of irrigability regarding these lands was fair and all parties understood it.

48. There are certain adjudicated historic areas in which the testimony presented by experts for Wyoming succeeded in rebutting the presumption of practicably irrigable acreage, and totals have been reduced accordingly.

49. The United States and Tribes seek a reserved water right for land known as the Arapahoe Ranch and the Padlock Ranch. The reserved right priority date

sought is the date of acquisition of these lands. All these parcels of land are outside of the stipulated Reservation boundaries. There is no evidence of a Congressional Act or Executive Order establishing a reservation of the lands of the Arapahoe Ranch and the Padlock Ranch purchases.

50. The United States and the Tribes claim an overall total of 71,619 acres of land as the measure of reserved water, for a total annual diversion of 420,462 acre-feet of water. Of these acres, 1,841.1 were of a class determined by United States' experts to be economically infeasible because of failure to meet size or arability standards, and 21 acres were of a class determined by United States expert Dornbusch to be economically infeasible. United States' experts found 882.8 acres Type IX, or "out" land; 884.6 acres Type VII, or "idle" land; 6,281.2 acres Class 6 land; and 1,778 acres subirrigated land, all nonarable by their standards, and their logs noted various reasons for the non-arability of another 1,588.8 acres. Ten acres are owned by non-Indians. State expert Sommers noted ten acres of adjudicated land on Dinwoody Canal that are more properly typed "VIII". Tribal expert Higginson determined 3,943 acres of Indian fee land to be "potentially irrigable", but insufficient showing was made that comparable acreage had been successfully irrigated. Deleting those 17,240.5 acres from the claim leaves 54,389 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, an average water duty of 4.45 acre-feet per acre to Type VIII lands, and an average water duty of 4.57 acre-feet per acre to Indian owned lands, equals an award of 288,355 acre-feet of water diverted annually from both the project canals and the non-project river basins.

Future Lands

51. A land classification and drainage investigation was conducted on the Wind River Indian Reservation by HKM Associates on undeveloped future lands under the direction and control of A.T. Kersich. Mr. Kersich is President of HKM and principal in charge of its water resources section. He has had considerable experience in arable land studies on other Indian reservations and testified as a similar project leader and expert witness for the United States in *Arizona v. California*, where his testimony formed one basis for the Master's opinion.

52. The "future" lands lie outside the boundaries of the Wind River Federal Irrigation Project, the Midvale Irrigation District and the LeClair Irrigation District Project, and have no history of irrigation. They are all located within the stipulated boundaries of the Wind River Indian Reservation.

53. One definition of PIA (practicably irrigable acres) was stipulated to by the United States, the Tribes and the State of Wyoming as "those acres susceptible to sustained irrigation at reasonable costs".

54. The Tribes contended that a valid second test for practicably irrigable acreage is whether the lands in question and the proposed irrigation projects are similar to other lands and projects actually in operation in the West which have sustained long term irrigation. In considering the five future project areas presented by the United States, the Master did not use the second PIA test proposed by the Tribes. He concluded the arability, irrigability, and economic via benefit-cost analysis, was a much stronger test.

55. The land classification and drainage study conducted by the United States included soil analysis, drainage investigation, topographical and geological considerations, climate data, water availability determination, cropping patterns, and irrigation system designs. The

land classification standards developed were applied both to lands susceptible of gravity irrigation and to lands capable of sprinkler irrigation.

56. "Arable lands" are those lands which are capable of sustained irrigation or which can sustain long-term irrigation.

57. The United States relied upon facts and data from the Bureau of Indian Affairs, the Bureau of Reclamation (also known as the Water and Power Resources Services), and the Soil Conservation Service, as well as new data compiled by its experts, in presenting its arability determination.

58. The United States' experts developed six study areas for its land classification consisting of approximately 490,000 acres.

59. The preliminary land classification study analyzed the land capability criteria of depth to barrier, water holding capacity, permeability, slope and texture to establish the study areas.

60. The United States classified the lands in the six study areas into six classes, segregating lands with similar characteristics into the same class with a reasonable degree of consistency and objectivity.

61. Factors considered by the United States in its land classification include soil texture, depth, moisture retention, alkalinity, salinity, surface gravel and cobble, slope, irrigation pattern and field size, level of the surface, surface cover, drainage, hydraulic conductivity and soil depth to barrier.

62. The United States' classification relied on land classifiers who augured and logged 197 borings between 5 and 10 feet deep and 357 borings of 5 feet or less, dug 9 backhoe pits, drilled and logged 117 deep roles, analyzed samples from 165 holes for soil chemistry, and ran 11 infiltration and 22 hydraulic conductivity tests.

63. Experts for the State of Wyoming reviewed the HKM data, but spent limited time in the field. The thrust of their testimony was to question the amount of arable land HKM identified. Mr. Fowkes' testimony was general in nature, and he presented no acreage totals he felt should be deleted from those identified as arable by HKM.

64. Some degree of error ineviably exists whenever a group of land classifiers are required to coordinate and analyze such a complex area as the Wind River Indian Reservation, relying on a field of expertise which, by its nature, lacks the certainty of mathematical perfection or objectivity.

65. Ten to fifteen percent is an appropriate reduction of the classified lands of the United States to account for the error and inaccuracy described above.

66. The following acreage totals satisfy arable land base determination for future projects:

Areas	Acres
North Crowheart	43,089
South Crowheart	7,187
Big Horn Flats	17,681
Riverton East	4,223
Owl Creek	223
Arapahoe	3,614
	76,017

67. Dr. Mesghinna of Stetson Engineers testified for the United States on engineering feasibility. The Tribes offered additional evidence from Keller Engineers and the State of Wyoming relying on the testimony from Banner and Associates.

68. The testimony of Dr. Mesghinna on the factors relating to engineering feasibility was a thorough, professional presentation and analysis of the subject. He is supervising engineer for Stetson Engineers, specializing

in irrigation systems design, drainage and hydrology. He is a well qualified expert in irrigation system design and engineering, irrigation construction costs, drainage and water requirements.

69. The Federal parties' testimony on elevation distinctions, cropping patterns, water availability, soil characteristics, market factors and other product transportation, was reasonable and persuasive.

70. The calculations by Dr. Mesghinna of the net irrigation requirement, costs and designs for the one-farm system, the pipe network, pumps and pumping plants, canals and related structures, drainage, and operation and maintenance are reasonable and supported by a preponderance of the evidence.

71. Dr. Mesghinna's conclusions on engineering feasibility are supported by a preponderance of the evidence.

72. Dr. Mesghinna's acreage totals must be reduced to reflect the reduction made in the arable land base determination of HKM but to account for the 5% reduction already made by him in his analysis.

73. The following acreage totals satisfy the engineering feasibility determination for the future projects:

Areas	Acres
North Crowheart	34,993
South Crowheart	4,238
Arapahoe	3,437
Riverton East	3,442
Big Horn Flats	2,410
	48,520

74. In his determination of diversion requirements, Dr. Mesghinna considered average wind velocity, water holding capacity, cropping patterns, root depths, type of delivery and conveyance systems planned, source of water,

conveyance distance, amount and velocity of water in the canals, efficiencies and management techniques.

75. The United States claimed a total diversion requirement of 209,372 acre-feet while the State of Wyoming claimed it should not exceed 180,424.3 acre-feet.

76. The total diversion requirement must still be reduced by the 10% factor for error and inaccuracy from the arable land base. Thus, the total diversion for each of the future projects is as follows:

Project	Total Diversion (acre-feet/year)
North Crowheart	133,324
South Crowheart	18,181
Arapahoe	15,088
Riverton East	15,837
Big Horn Flats	6,507
Total	188,937

77. The United States, through testimony of Mr. Dornbusch, presented an economic feasibility analysis for the "at a reasonable cost" aspect of the practicably irrigable acreage test. Mr. Dornbusch is both a graduate engineer and an economist. He is experienced in feasibility studies for irrigated agriculture and other agricultural industries. He has performed large scale agricultural feasibility studies both in this country and abroad.

78. The State of Wyoming used the benefit-cost ratio approach, but maintained that none of the future projects would be economically feasible.

79. Dr. James Jacobs, for the State of Wyoming, performed an economic analysis of the projects. Dr. Jacobs is a professor of agricultural economics at the University of Wyoming. His experience has been primarily with the economic effect of varying agricultural practices. He has had experience with crop budgets.

80. The cropping patterns developed by Mr. Dornbusch from a variety of sources were reasonable and supported by a preponderance of the evidence. His crop yields were suported by a variety of sources in the evidence and were reasonable, as were his crop prices.

81. The determination by the experts for the State of Wyoming of production costs based on a 320 acre farming unit is unrealistic in light of the proposed future projects, and unreasonably inflates the production cost estimate.

82. Mr. Dornbusch's approach to estimating prices, useful life and hours of use for the farm machinery was reasonable and supported by the evidence.

83. Mr. Dornbusch analyzed the employment outlook for Indians on the Wind River Indian Reservation and concluded some opportunity costs for labor and management could be reduced or eliminated given the historically high rate of unemployment on the Reservation. His position was supported by the evidence.

84. The incremental, or ten year phase-in of management personnel from the Indian labor force by Mr. Dornbusch is reasonable and supported by the evidence.

85. The normalization factor used by Mr. Dornbusch for prices and costs is supported by the evidence and is representative of current practices.

86. The United States, the State of Wyoming, and the Tribes all presented experts and testimony on the appropriate discount rate to use in the economic feasibility analysis.

87. In determining the appropriate discount rate, the relevant considerations are the opportunity cost of capital displaced from investment and consumption in the long term and social time preference.

88. Mr. Dornbusch for the United States selected a range of two to four percent as the correct discount rate.

He used four percent as a conservative figure in his analysis.

89. Dr. Stephen Goldfeld, a witness for the United States, testified that an appropriate range would be from one to four percent, with two and one-half as a single rate to use. Dr. Goldfeld is the head of the Department of Economics at Princeton University and has served on the staff and as an appointed member of the President's Council of Economic Advisors. He is an expert on real rates of interest and costs of capital.

90. Dr. David Brookshire for the State of Wyoming testified that a range of four to eleven percent should be used and that no single rate should be selected.

91. Dr. Ronald Cummings for the Tribes questioned whether discounting was necessarily proper in evaluating the future needs of the Wind River Indian Reservation, but concluded that he would select a range of two to four percent as appropriate.

92. The preponderance of the evidence clearly supports as reasonable, the discount rate of four percent interest used by the United States in its economic analysis.

93. Mr. Dornbusch concluded, after applying a four percent discount rate in his feasibility study, that the five projects designed by Dr. Mesghinna were economically feasible. He provided the following benefit-cost figures:

Project	B-C Ratio
North Crowheart	1.47
South Crowheart	1.29
Big Horn Flats	1.07
Riverton East	1.25
Arapahoe	1.53

94. Dr. Goldfeld's analysis of the Fraumeni-Jorgenson article, "Rates of Return by Industrial Section in the United States, 1948-76", and his position on oppor-

tunity cost of capital was persuasive and is supported by the evidence.

95. A conclusion of an economic or sensitivity analysis on the Wind River Indian Reservation, that none of the proposed future project lands are economically feasible is refuted by the evidence of the case and is contrary to the conditions of the Reservation that it lacks any probative value.

96. Mr. Willard Wilson, Chairman of the Board of a bank in Thermopolis, testified that an appropriate net, inflation-proof profit margin would be one-half to three percent in banking, which is financial analysis evidence that supports in part the above findings.

97. Future lands found to be practicably irrigable and therefore deserving of an award of a reserved water right as listed are as follows:

Project	Acreage	Unit Diversion (acre-feet/acre)	Total Diversion (acre-feet/acre)
North Crowheart	34,993	3.81	133,324
South Crowheart	4,238	4.29	18,181
Araphaoe	3,437	4.39	15,088
Riverton East	3,442	4.60	15,837
Big Horn Flats	2,410	2.70	6,507
Total	48,520		188,937

98. The Court finds that the construction of any one or all of the future projects would have an adverse effect on other water users.

99. The Tribes presented the testimony of Lyman Willardson, Ronald Bliesner and Jack Keller in support of their claim for additional practicably irrigable acreage on Stagner Ridge and additional acreage in Big Horn Flats.

100. The Tribal testimony showed that the Stetson conceptual irrigation plan was too elaborate and too costly.

101. The analysis performed by Dr. Willardson was cursory and a very small amount of time was actually spent in field investigation.

102. Experts for the United States, both Stetson Engineers and Dornbusch and Company, also evaluated the additional future acreage and excluded it from their final totals.

103. The Tribes claimed that the additional future lands would be economically feasible by reducing the planned drainage of Dr. Mesghinna and passing that cost savings to the additional acreage.

104. The drainage plan proposed by Stetson is reasonable and any reduction in it jeopardizes the chance for proper drainage of the proposed projects.

105. The additional claims for future acreage on Stagner Ridge and Big Horn Flats Extension must be denied because they fail to meet the test of practicably irrigable acreage and do not meet the burden of proof, generally, from the evidence.

Other Findings

106. Many settlers who applied for and received early permits labored for years to perfect their ditch work and diversions into adjudicated certificates to assure a source of water.

107. The Homestead Act of 1862, expanded in 1916 to include grazing lands, set out conditions for settlement of unappropriated public lands in the Rocky Mountain West. As a result of this legislation, over 132,898 acres in Water Division 3 were settled by non-Indians between 1890 and 1920.

108. By the Desert Lands Act of 1873, Congress recognized that water was necessary for the successful set-

tlement of arid western lands and asserted to the doctrine of prior appropriation. As a result of this Act, approximately 23,590 acres in Water Division 3 were settled by non-Indians between 1916 and 1925.

109. Congress, in the Carey Act of 1894, again recognized the prior appropriation doctrine, the importance of water, and the necessity of irrigation for the successful development of arid lands. That Act outlined a disposal policy which resulted in the additional settlement by non-Indians of approximately 75,111 acres of Water Division 3.

110. The Reclamation Act of 1902 further recognized the necessity of water for settlement in the West. It stated that any project authorized under the Act was to proceed in recognition of state water rights laws. In Water Division 3, over 23,000 acres were deeded to non-Indians under this Act.

111. Approximately 255,000 acres in Water Division 3 were settled by non-Indians as a result of the Homestead Act of 1862, expanded in 1916, the Desert Lands Act of 1873, the Carey Act of 1894, and the Reclamation Act of 1902.

112. Some 9,000 defendants are on record as holders of approximately 25,000 adjudicated certificates.

113. Evidence presented in the case is insufficient to support any award of a reserved right for "Fishery flows" for the Wind River Indian Reservation.

114. Evidence is insufficient to support any award of a reserved right for aesthetics and wildlife for the Wind River Indian Reservation.

115. Evidence is insufficient to support an award of a reserved right for industrial or mineral development.

116. Insofar as the Reservation is entitled to a reserved right for agricultural purposes, domestic uses are subsumed within that right.

117. To the extent that an agricultural reserved right exists for the Reservation, it includes stockwatering or livestock as a related use.

118. Neither federal law nor Wyoming law provides any basis for the proposition that the Arapahoe and Shoshone Tribes own the underground water beneath the Wind River Indian Reservation. The United States Supreme Court has expressly refused to extend the reserved right doctrine to include underground water. The State of Wyoming applied the doctrine of prior appropriation to the State's underground water. Ownership of overlying land carries with it no right to underground water.

119. There exists no method other than appropriation by which a right to underground water may be obtained in Wyoming. Ownership of overlying land, water, or any other element has never been the basis of underground water rights. Because the reserved right doctrine does not apply to underground water, the Tribes must acquire rights to groundwater under Wyoming law.

120. The Court finds that during the years the Tribes have used both surface and groundwater for purposes of agriculture, livestock, domestic, municipal, mineral and industrial.

121. While he did not address administration directly, the Special Master did provide in his recommended decree that the State Engineer should have the right to monitor diversions for irrigation and stock watering.

122. The Court finds that effective administration of both Indian and non-Indian and federal and state-awarded water rights requires a single administrative

system and agency. A nonunified and inconsistent dual system of administering federal and state-awarded water rights would introduce inefficiency and uncertainty to the detriment of all water users and contrary to the legislative intent that led to the enactment of the McCarran Amendment, 43 U.S.C. #666, and Wyoming's general stream adjudication statute, Wyo. Stat. #1-37-106.

123. The Court finds that the State Engineer has responsibility for the administration of all state-awarded water rights in Division 3 as well as the Indian and Federal non-Indian water rights.

124. The Court finds there are many tracts of land on which the United States holds state water permits and on which there exist reserved water rights.

Conclusions of Law

1. The Court has jurisdiction over the subject matter of this general adjudication pursuant to W.S. Section 1-37-106.

2. The sole purpose behind the creation of the Wind River Indian Reservation was agricultural, which included related uses, domestic and livestock.

3. At the creation of the Wind River Reservation by the Treaty of Ft. Bridger on July 3, 1868, a reservation reserved water right vested with a priority date of July 3, 1868 for the sole purpose of agriculture and related uses, domestic and livestock.

4. That a reservation reserved water right does not exist in favor of the United States nor Tribes for the purpose of any of the following uses: industrial, mineral, municipal, fisheries, wildlife or aesthetics.

5. In view of the purpose of the Wind River Indian Reservation being solely agricultural, the only reserved water rights that could be granted or quan-

tified for the future projects would be to irrigate the practicably irrigable acreage on the said reservation.

6. All lands that have been sold out of Indian ownership but have been reacquired and are presently held in trust by the United States for the Tribes or members of the Tribes of the Wind River Indian Reservation have a reserved water right with a priority of the date of either the date sold out of Indian ownership or the date of a state water right, whichever is earlier.

7. Neither the United States nor the Tribes are entitled to a reservation reserved water right for those lands outside of the stipulated boundaries of the Wind River Indian Reservation known as the Arapahoe Ranch and the Padlock Ranch that have been purchased and are held in trust by the United States for the Shoshone and Arapahoe Indians.

   The Court holds that the Tribes are entitled to a water right as of the date of the applicable state permits, but the confirmation of the state water permits owned by the Tribes which apply to these said lands will be considered in the third phase of this case.

8. Neither federal law nor Wyoming law provides any basis for the proposition that the Arapahoe and Shoshone Tribes own the underground water beneath the Wind River Indian Reservation. The United States Supreme Court has expressly refused to extend the reserved right doctrine to include underground water. The State of Wyoming applied the doctrine of prior appropriation to the State's underground water. Just as in the case of surface water, the right to use underground water is acquired solely by placing water to beneficial use. Ownership of overlying land carries with it no right to underground water. There exists no method other than appropriation by which

a right to underground water may be obtained in Wyoming. Ownership of overlying land, water, or any other element has never been the basis of underground water rights. Because the reserved right doctrine does not apply to underground water, the Tribes must acquire rights to groundwater under Wyoming law.

9. The doctrine of equitable estoppel is applicable against the United States on behalf of the Tribes on the matter of the construction of the five awarded future projects.

10. There are many tracts of land on which there exist reserved water rights as well as some State certified rights with the associated priority dates. The United States and the Tribes lay claim to both water rights. The Court concludes that the United States and the Tribes are entitled to only one water right on the same land and that all State water permits which have later priority dates than the Court awarded reserved water rights covering the same lands should be cancelled.

11. The Court cannot dictate to the Tribes how they must use water that comes under a reserved water right but the Court can restrict any use of said water to within the boundaries of the reservation.

12. The Tribes can sell or lease any part of the water covered by their reserved water rights but the said sale or lease cannot be for exportation off of the Reservation.

13. The Tribes are entitled to continue the use of such amounts of surface and groundwater which are not covered by reservation reserved rights but only so long as the present uses are continued.

14. There being an overriding need for unified administration of water rights in Division 3, the State Engineer should administer the judgment under the currently existing system of water administration.

Judgment and Decree

NOW THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the Court approves and ADOPTS the Special Master's Report, except as inconsistent with this Decision; it is hereby ORDERED, ADJUDGED and DECREED that:

1. The United States has reserved, by virtue of the Treaty of Fort Bridger, July 3, 1868, and for the benefit of the Shoshone and Arapahoe Tribes of the Wind River Reservation, the right to divert water, or to have water diverted, in the amounts set forth herein, and from the streams set forth herein, and that said right has a priority date of July 3, 1868.

Description/Source	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
PROJECT LANDS—HISTORIC (does not include Indian fee owned land)		
WIND RIVER FEDERAL IRRIGATION PROJECT		
Little Wind Unit:		
Ray Canal	8,728	40,573
Coolidge Canal	6,425	27,880
Sub Agency Canal	2,958	13,730
Subtotal	18,111	82,183
Upper Wind Unit:		
(unspecified)	492	2,056
Wind River "A" Canal	944	9,959
Dinwoody Canal	4,716	49,754
Subtotal	6,152	61,769
Johnstown Unit:	667	3,837
Lefthand Unit:	1,205	7,267
MIDVALE IRRIGATION DISTRICT:	561	2,738
RIVERTON-LECLAIR IRRIGATION DISTRICT:	1,066	5,117
PROJECT LANDS SUBTOTAL	27,762	162,911

Description/Source	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
NON-PROJECT LANDS—HISTORIC (including all Indian owned fee lands awarded)		
WIND RIVER BASIN		
East Fork Wind River	32	141
Dinwoody Creek	134	649
Sand Draw	—0—	—0—
Dry Creek	1,273	5,584
Bull Lake Creek	63	296
Meadow Creek	680	3,125
Dry Pasup Creek	1,550	7,179
Crow Creek	2,505	11,646
Willow Creek	194	876
Main Stem Wind River	4,442	20,842
Subtotal	10,873	50,338
LITTLE WIND RIVER BASIN		
North Fork Little Wind River	1,712	7,961
South Fork Little Wind River	1,113	5,085
Main Stem Little Wind River	1,620	8,177
Mill Creek	28	136
Sage Creek	1,797	8,686
Crooked Creek	69	317
Trout Creek	228	1,088
Spring Creek	178	773
Bighorn Draw	139	600
Subtotal	6,884	32,823
BIG HORN RIVER BASIN		
Main Stem Bighorn River	54	280
Cottonwood Creek	689	3,548
Fivemile Creek	423	2,055
Muddy Creek	3,293	15,819
Dry Muddy Creek	—0—	—0—
Maverick Springs Draw	—0—	—0—
Roundup or Warm Springs	35	153
Subtotal	4,494	21,855

Description/Source	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
POPO AGIE RIVER BASIN		
North Fork Popo Agie River	472	2,231
Main Stem Popo Agie River	71	347
Subtotal	543	2,578
OWL CREEK BASIN		
South Fork Owl Creek	998	4,455
Main Stem Owl Creek	2,069	9,775
Mud Creek	766	3,620
Red Creek	—0—	—0—
Subtotal	3,833	17,850
NON PROJECT LANDS SUBTOTAL	26,627	125,444
PROJECT LANDS SUBTOTAL	27,762	162,911
TOTAL HISTORIC PROJECT AND NON-PROJECT LANDS	54,389	288,355

2. The United States has reserved, by virtue of the Treaty of Fort Bridger, July 3, 1868, and for the benefit of the Shoshone and Arapahoe Tribes of the Wind River Reservation, the right to divert water, or to have water diverted, in the amounts set forth herein, for the five awarded future projects, provided that before construction can begin on any one of the said five projects, upstream storage has to be in place in order to replace the awarded annual acre-feet diversion for that project. The said right has a priority date of July 3, 1868.

Future Projects	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
North Crowheart	34,993	133,324
South Crowheart	4,238	18,181
Arapahoe	3,437	15,088
Riverton East	3,442	15,837
Big Horn Flats	2,410	6,507
TOTAL FUTURE PROJECTS	48,520	188,937

3. It might be that lands included in Paragraphs one (1) and two (2) above, contain some reacquired land, which has a priority date of whichever is earlier: when the land left Indian ownership and was purchased by a non-Indian or the date of the applicable state water permit. If from the records, an accurate determination of the reacquired lands cannot be made, then the major parties will stipulate such determination, and in the event the stipulation cannot be reached, then further hearings will be held in order to effect such determination.

4. The sole purpose behind the creation of the Wind River Indian Reservation was agricultural, which included related uses, domestic and livestock.

5. That a reservation reserved water right does not exist in favor of the United States nor Tribes for the purpose of any of the following uses: industrial, mineral, municipal, fisheries, wildlife or aesthetics.

6. Neither the United States nor the Tribes are entitled to a reservation reserved water right for those lands outside of the stipulated boundaries of the Wind River Indian Reservation known as the Arapahoe Ranch and the Padlock Ranch that have been purchased and are held in trust by the United States for the Shoshone and Arapahoe Indians.

7. Neither the United States nor Tribes have a reservation reserved water right to groundwater.

8. The Tribes are entitled to make such use of the water covered by their reserved water rights they deem advisable but the use is confined to the reservation and in no event shall the consumptive use be increased.

9. The Tribes can sell or lease any part of the water covered by their reserved water rights but the said sale or lease cannot be for exportation off of the reservation and in no event shall the consumptive use be increased.

10. The Tribes are entitled to continue the use of such amounts of surface and groundwater which they are now using, and which are not covered by reserved rights but only so long as the present uses are continued, unless approval is obtained from the State Engineer's Office and in no event shall the consumptive use be increased.

11. All State water permits which have later priority dates than the Court awarded reserved water right dates and which cover the same tracts of land are hereby cancelled.

12. The water rights under this Decree shall in the first instance be administered by the Wyoming State Engineer in accordance with the terms set forth herein. Prior to seeking judicial enforcement of any right under this Decree, the United States shall first request the State Engineer to exercise his administrative authority.

13. The United States and Tribes shall install or cause to be installed such measuring devices for all water rights decreed herein as may be reasonably required by the State Engineer to administer such rights adequately in the same manner and to the same effect as may be required in the future of or imposed on any other water user under Wyoming law.

14. Pursuant to W.R.C.P. 54(b) the Court finds that there is no just reason for delay for entry of final judgment on the claims described herein, and therefore, ORDERS same.

DONE this 10th day of May, 1983.

/s/ Harold Joffe
HAROLD JOFFE
District Judge

APPENDIX A

TREATY WITH THE EASTERN BAND SHOSHONI AND BANNOCK, 1868.

Articles of a treaty made and concluded at Fort Bridger, Utah Territory, on the third day of July, in the year of our Lord one thousand eight hundred and sixty-eight, by and between the undersigned commissioners on the part of the United States, and the undersigned chiefs and head-men of and representing the Shoshonee (eastern band) and Bannack tribes of Indians, they being duly authorized to act in the premises:

ARTICLE 1. From this day forward peace between the parties to this treaty shall forever continue. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs, at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to the laws; and in case they wilfully refuse so to do, the person injured shall be re-imbursed for his loss from the annuities or other moneys due or to become due to them

under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating or because of his violating the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

ARTICLE 2. It is agreed that whenever the Bannacks desire a reservation to be set apart for their use, or whenever the President of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them in their present country, which shall embrace reasonable portions of the "Port Neuf" and "Kansas Prairie" counties, and that, when this reservation is declared, the United States will secure to the Bannacks the same rights and privileges therein, and make the same and like expenditures therein for their benefit, except the agency house and residence of agent, in proportion to their numbers, as herein provided for the Shoshonee reservation. The United States further agrees that the following district of country, to wit: Commencing at the mouth of Owl Creek and running due south to the crest of the divide between the Sweetwater and Papo Agie Rivers; thence along the crest of said divide and the summit of Wind River Mountains to the longitude of North Fork of Wind River; thence due north to mouth of said North Fork and up its channel to a point twenty miles above its mouth; thence in a straight line to head-waters of Owl Creek and along middle of channel of Owl Creek to place of beginning, shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst

them; and the United States now solemnly agrees that no persons except those herein designated and authorized to do so, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

ARTICLE 3. The United States agree, at its own proper expense, to construct at a suitable point of the Shoshonee reservation a warehouse or store-room for the use of the agent in storing goods belonging to the Indians, to cost not exceeding two thousand dollars; an agency building for the residence of the agent, to cost not exceeding three thousand; a residence for the physician, to cost not more than two thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a schoolhouse or mission building so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding twenty-five hundred dollars.

The United States agrees further to cause to be erected on said Shoshonee reservation, near the other buildings herein authorized, a good steam circular-saw mill, with a grist-mill and shingle-machine attached, the same to cost not more than eight thousand dollars.

ARTICLE 4. The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt on the unoccupied lands as of the United States so long as game may be found thereon, and so long as peace

subsists among the whites and Indians on the borders of the hunting districts.

ARTICLE 5. The United States agrees that the agent for said Indians shall in the future make his home at the agency building on the Shoshonee reservation, but shall direct and supervise affairs at the Bannack reservation; and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE 6. If any individual belonging to said tribes of Indians, or legally incorported with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within the reservation of his tribe, not exceeding three hundred and twenty acres in extent, which tract so selected, certified, and recorded in the "land-book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above described. For each tract of land so selected a certificate, containing a description thereof, and the name of the person selecting it, with a certificate indorsed thereon that the same has been recorded, shall

be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office subject to inspection, which said book shall be known as the "Shoshone (eastern band) and Bannack land-book."

The President may at any time order a survey of these reservations, and when so surveyed Congress shall provide for protecting the rights of the Indian settlers in these improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations, and the internal police thereof, as may be thought proper.

ARTICLE 7. In order to insure the civilization of the tribes entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years.

ARTICLE 8. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, in value one hundred dollars, and for each succeeding year he shall continue to farm,

for a period of three years more, he shall be entitled to receive seeds and implements as aforesaid in value twenty-five dollars per annum.

And it is further stipulated that such persons as commence farming shall receive instructions from the farmers herein provided for, and whenever more than one hundred persons on either reservation shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be required.

ARTICLE 9. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with them, the United States agrees to deliver at the agency-house on the reservation herein provided for, on the first day of September of each year, for thirty years, the following articles, to wit:

For each male person over fourteen years of age, a suit of good substantial woollen clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woollen socks; for each female over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woollen hose, twelve yards of calico; and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woollen hose for each.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based; and in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian roaming and twenty dollars for each Indian engaged in

agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper. And if at any time within the ten years it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the tribes herein named, Congress may by law change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the Army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

ARTICLE 10. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmith, as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

ARTICLE 11. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive without his consent, any individual member of the tribe of his right to any tract of land selected by him, as provided in Article 6 of this treaty.

ARTICLE 12. It is agreed that the sum of five hundred dollars annually, for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe who, in the judg-

ment of the agent, may grow the most valuable crops for the respective year.

ARTICLE 13. It is further agreed that until such time as the agency-buildings are established on the Shoshonee reservation, their agent shall reside at Fort Bridger, U. T., and their annuities shall be delivered to them at the same place in June of each year.

N. G. Taylor, [SEAL]
W. T. Sherman, [SEAL]
Lieutenant-General
Wm. S. Harney, [SEAL]
John B. Sanborn, [SEAL]
S. F. Tappan, [SEAL]
C. C. Augur, [SEAL]
Brevet Major-General, U.S. Army, Commissioners.
Alfred H. Terry, [SEAL]
Brigadier-General and Brevet Major-General, U.S. Army.

Attest:

A. S. H. White, Secretary.

Shoshones:

Wash-a-kie, his x mark.
Wau-ny-pits, his x mark.
Toop-se-po-wot, his x mark.
Nar-kok, his x mark.
Taboonshe-ya, his x mark.
Bazeel, his x mark.
Pan-to-she-ga, his x mark.
Ninny-Bitse, his x mark.

Bannacks:

Tagee, his x mark.
Tay-to-ba, his x mark.
We-rat-ze-won-a-gen, his x mark.
Coo-sha-gan, his x mark.
Pan-sook-a-motse, his x mark.
A-wite-etse, his x mark.

Witnesses:

Henry A. Morrow,
Lieutenant-Colonel Thirty-sixth Infantry and
Brevet Colonel U.S. Army,
Commanding Fort Bridger.
Luther Manpa, United States Indian agent.
W. A. Carter.
J. Van Allen Carter, interpreter.

APPENDIX G

IN THE DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT
STATE OF WYOMING

Civil No. 4993

IN RE: THE GENERAL ADJUDICATION
OF ALL RIGHTS TO USE WATER IN THE
BIG HORN RIVER SYSTEM AND ALL
OTHER SOURCES,
STATE OF WYOMING.

Teno Roncalio, Special Master

SUPPLEMENTAL AND FINAL REPORT

CONCERNING:

I. The Claims of Certain Defendants based on Reacquired Indian Allotment Land

II. The Disposition of Expired Permits

III. The Confirming of Adjudicated Certificates

JUNE 1, 1984

TABLE OF CONTENTS

		Page
PART I:	THE CLAIMS OF CERTAIN DEFENDANTS BASED ON REACQUIRED INDIAN ALLOTMENT LAND	282a
	A. INTRODUCTORY STATEMENT	282a
	B. PROCEDURAL HISTORY	283a
	C. HISTORY OF "WALTON RIGHT" CLAIMS	283a
	D. INDIVIDUAL CLAIMS	287a
	E. FINDINGS OF FACT AND CONCLUSIONS OF LAW	326a
	F. RECOMMENDED FINAL DECREE	344a
PART II:	DISPOSITION OF UNADJUDICATED CERTIFICATES	360a
PART III:	THE CONFIRMING OF ADJUDICATED CERTIFICATES	363a

PART I

THE CLAIMS OF CERTAIN DEFENDANTS BASED ON REACQUIRED ALLOTMENT LAND

A. INTRODUCTORY STATEMENT

This Supplemental Report concerns that portion of the general adjudication of all of the rights to use water in the Big Horn River System and all other sources dealing with claims of certain non-Indian parties for water rights based on the purchase of land by a non-Indian from an Indian allottee, or successor, which land was originally a part of the Wind River Indian Reservation. These claims have a variety of legal basis. For convenience sake, and without attaching legal signifiance, there are treated herein as "Walton rights", and include those claims seeking a 1905 State Permit as well as those which claim a purchased reserved right dating from 1868, the date of the Wind River Indian Reservation.

Part I is limited to a discussion of these claims. It augments the December 15, 1982 Report Concerning Reserved Water Right Claims By and On Behalf of The Tribes of the Wind River Indian Reservation, Wyoming. It is not intended to amend or alter any portion of that Report, or to reconsider any of the subject matter contained therein. It is controlled by the May 10, 1983 decision of Judge Joffe.

This Supplemental and Final Report was delayed for nearly eighteen months pending Wyoming's proposal for the handling of the third and final phase of this adjudication, i.e. how to dispose of the approximately 7,000 expired permits on record in the office of the State Engineer. Early in 1983, Wyoming announced a process that notice would be given before cancellations would be in effect of these expired permits. To the best of my knowledge, such a plan may be in operation at this time and I will address that final portion of the adjudication in Part II of this Report.

B. PROCEDURAL HISTORY

This general adjudication began on January 24, 1977 when the State of Wyoming filed its complaint in the Fifth Judicial District Court at Worland, Wyoming. In response, many defendants filed answers claiming reserved water rights as non-Indian owners of lands originally allotted to tribal members. These claimants, relying on *Colville Confederated Tribes v. Walton*,[1] sought a priority date of 1868 for their irrigated lands. Near the conclusion of the hearings regarding the claims for the Wind River Indian Reservation, some evidence was heard regarding the non-Indian successors' claims and a decision was made to hold further evidentiary hearings. These were held January 25 and 26, 1983, in Lander, Wyoming.

When the hearings were completed, the State of Wyoming filed objections to documentary evidence submitted during the hearings. A memorandum opinion was issued on April 5, 1983, wherein these objections were examined and overruled. Subsequently, proposed findings of fact, conclusions of law and decrees were submitted by the various interested parties.

The claimants were not required to submit formal statements. Attorneys for the claimants, particularly Mr. Sky Phifer, submitted exhibits which set forth the names of the claimants and legal descriptions of lands.

C. HISTORY OF "WALTON RIGHT" CLAIMS

As alluded to briefly above, the individuals claiming a right to water are non-Indian successors in interest to land which was once owned by an Indian and was a part of the Wind River Indian Reservation. Although originally held in trust for the Tribes, certain land within the reservation became the property of individual Indians

---

[1] *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (1978), 647 F.2d 42 (9th Cir. 1981).

pursuant to the General Allotment Act of 1887, 24 Stat. 388. Once all the provisions of that Act were met, a patent would often issue to the Indian allottee. From that point on, the land would be considered the property of the allottee and the allottee would treat that particular allotment of real property as any other land owner, which included the right to convey in fee, lease, encumber or make other legal disposition.

The sale of allotted land to a non-Indian raises this question: Does the sale also transfer enjoyment of the reserved water right held by the Indian allottee? The "Walton right" claim stems from that fact situation which was presented in United States District Court in Washington in the case of *Colville Confederated Tribes v. Walton*, 460 F.Supp. 1320 (1978). There, as in our situation, the claimant argued that the General Allotment Act passed to the individual Indian allottees a portion of the reservation's reserved water, which became appurtenant to the land and was conveyed to a non-Indian when the land was sold to a non-Indian. The trial court held that Walton was not entitled to share in the tribe's reserved water rights (*Walton I*). On appeal, that decision was reversed and the Ninth Circuit Court of Appeals held that Walton was entitled to his share of the reserved waters. *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (1981), (known as *Walton II*). The United States Supreme Court denied certiorari. 454 U.S. 1092 (1981). On remand, the trial court again calculated the respective rights of the parties. U.S. District Court, Eastern District of Washington, Memorandum Decision, filed August 31, 1983. This latter judgment is known as "Walton III", or the *third* Walton decision on this vexing issue.[2]

---

[2] An indication of the growing disenchantment with water cases and an almost daming indictment of the Public Works project concept of attorneys involved in the water litigation can be gleaned from the following quotation from the last page of the Memorandum

In addition to the claim for a purchased reserved right date, the claimants in *Walton* and in this adjudication alternatively asked for a priority date for the lands irrigated as of the date of application to the state for a permit to use water. The Court of Appeals in *Walton II* [3] held that state has no power to regulate water in the system and that the permits are of no force and effect. Our situation differs in that some of the claimants here seek a priority date based on permit applications initiated by or on behalf of the Indian allottees. In general, the priority date sought here is 1905. These rights are also referred to as "purchased reserved rights".

It is necessary for a reader who would want to be thoroughly familiar with this problem to have access to my Report filed December 15, 1982, concerning reserved water right claims by and on behalf of the Wind River Indian Reservation, Wyoming.

In that report (page 44), there is the initial discussion of the reacquisition by a non-Indian entity and the ruling which denies treaty-date priority to any non-Indian or his successor. That finding and rule supports and sus-

---

Decision of The Honorable Robert J. McNichols, United States District Judge in Spokane, in the completion of the *Walton III* decision:

> "Gratuitous though it may appear, this Court is of the opinion that no matter what result obtained when the final chapter of this litigation is at long last written, the parties are going to have to come to grips with the proposition that a spirit of cooperation may be the best answer to efficient and fair utilization of No Name Creek Basin. If the thrust and motivation underlying the instant lawsuit is merely to provide attorneys with the form for launching abstrouse forays into matters esoteric, then the entire project has been a phenominal success. On the other hand, if the purpose of this action is to provide each of the competing interests an equitable share and thereby promote maximum utilization of a limited resource for the mutual benefit of all concerned, a little more unity of purpose may be indicated."

[3] *Walton II*, 647 F.2d at p.51.

tains Wyoming law,[4] affirming that non-Indians who purchase from Indians do not receive superior rights stemming from the treaty.

It is the law of *Walton I*, and I have deliberately reviewed *Walton II* and *Walton III* and found nothing which would cause me to change this position.

In the Lander hearings, several of the defendants were represented somewhat as a class by Messrs. Michael Messinger and James Barrett. These took the "Landis Webber" position that each was entitled to an 1868 priority date by virtue of conveyances from Indian authority or from an actual Indian allottee.

Therefore, my first ruling of this phase II of the adjudication is to again assert that no evidence adduced either in the year-long hearings on the Indian claims or upon the Lander hearings of those claiming under *Walton* or purchased rights—no evidence adduced in either of these events—warrants any change of conclusion in this regard. The view that *Merrill v. Bishop* be not overturned has now been approved by Judge Joffe in his Decree of May 10, 1983, and I believe it will withstand the continued efforts of water users to seek a treaty-date priority. The recommended judgment herein will reflect this conclusion.

As to the remaining claimants, I treat each defendant chronologically and base all findings upon the evidence adduced at Lander. Most of these claimants were represented by Sky Phifer; a total of twenty-eight witnesses testified and some eighty exhibits were introduced. They are as follows:

---

[4] *Merrill v. Bishop*, 74 Wyo. 298, 287 P.2d 620 (1955).

D. INDIVIDUAL CLAIMS

CLAIM NO. 1

CLAIMANT, RUDY AND NANCY ZUPENCE

Box 333, Ft. Washakie, Wyoming 82514

Acres claimed: 50

Acres awarded: 50

Acre-feet Per Year Awarded: 150

Priority Date: March 18, 1905

Township 1 South, Range 1 West of the W.R.M:

Section 5: NE¼SW¼, N½SE¼SW¼, W½SE¼SE¼SW¼

These lands receive water from the Ray Ditch, Lateral 2-C. The acreage lies south of the south fork of the Little Wind River. Present owners for thirteen years relied upon annual deliveries of water from the Bureau of Indian Affairs and paid annual maintenance and irrigation assessments to the Bureau of Indian Affairs for the water. There was no question about water rights in the mind of the Zupence's until the adjudication was filed by the State of Wyoming.

The land was acquired from predecessors who traced the chain of title to Frank Sorrell, the original Indian allottee. Acreage under irrigation totalled 50 acres; 30 acres of hay meadow and 20 acres of pasture. The evidence by several whose testimony can be considered expert in this regard establishes a water duty of an average of three acre-feet per year for the noted crops.

In this case, as in many to follow, the fact that the State of Wyoming acquiesced in delivery of water for so many years to the present claimants and their predeces-

sors, coupled with the fact that annual fees were received by the Bureau of Indian Affairs and the managers of this federal irrigation project for delivery of water, and that water was delivered, constitutes a sufficient finding for a conclusion of law that these claimants are entitled to a water permit for the delivery of 150 acre-feet per year delivered through the Ray Canal, with a priority date to be the identical date of the Federal Irrigation Project served by the Ray Ditch, i.e. March 18, 1905. Despite a conflict of evidence on what was the date of conveyance from the Tribes to Sorrell, the October 18, 1907 date was a date of first conveyance. It was noted again that Wyoming counsel made no objections regarding this evidence, nor presented evidence of their own, at the Lander hearings on this claim or on any of the others to follow.

CLAIM NO. 2

CLAIMANT, ALBERT HORNECKER

Route 61, Ethete, Wyoming

Acres claimed: 420.97

Acres awarded: 318.15

Acre-feet Per Year Awarded: 954.48

Priority Date: March 18, 1905

Parcel and Land Description [6]	Acreage	Award
Section 21: SW¼SW¼	38.85	116.55
Section 27: N½NW¼	64.25	192.75
Section 28: N½SE¼	77.75	233.25
Section 28: SW¼SE¼, SE¼SW¼	69.99	209.97
Section 29: SE¼SW¼	31.70	95.13
Section 32: NW¼NE¼	35.61	106.83
TOTALS	318.15	954.48

There was no evidence presented to rebutt Mr. Hornecker's testimony, nor was there cross-examination regarding exhibits introduced in this report. Wyoming did file, some months after the Lander hearing, proposed findings which assert that actual title transfer on some of the Hornecker tracts were not from the allottee, but from the United States. I find that if this is a fact, it nevertheless does not bear from the basic principle that these were allotment lands, were owned by non-Indians, received water for many years (to which witnesses concurred), and were acquired by the present claimant beginning with deeds dating in 1961. As such, they are as eligible for a water permit.

[6] All claims are in Township 1 South, Range 1 East of the Wind River Meridian.

Mr. Hornecker's acreage was broken down into eight parcels with some State permits expired on some, but not cancelled, and adjudicated permits in force on two parcels which, ironically, were the least attractive from an irrigability standpoint, D-7 and D-8 having adjudicated certificates upon them, had their acreage removed from this consideration.

All remaining six tracts are served by the Ray Canal and findings include that their crops patterns, water duty and priority date should apply as in Claim No. 1 herein, and the others similarly situated.

CLAIM NO. 3

CLAIMANT, CHARLES M. ROEMER

Box 563, Lander, Wyoming 82520

Acres claimed: 53

Acres awarded: 25

Acre-feet Per Year Awarded: 75

Priority Date: March 18, 1905

Township 1 South, Range 1 West of the W.R.M.

Section 5: S½NW¼SE¼, NW¼NW¼SE¼, SW¼SE¼

This land was purchased from Mr. Sorrell, the allottee, in 1954. I find the evidence presented by the claimant is sufficient to justify the award of a state water right for 25 of the claimed 53 acres. My reason for reducing acreage lies in the few and simple facts adduced upon cross-examination: that the Bureau of Indian Affairs in their 1981 assessments reduced the acreage of this claimant from 53 to 24 acres and made charges accordingly; and Mr. Roemer himself testified that his annual adjusted charges on the 24 acre assessment was $157.00 per year and that that is what he has been paying.

Duty on this acreage is similar to the prior claimants' and the resultant award should be for an annual volume of 75 acre-feet. It is served from the Ray Ditch.

The owner testified that this is flood irrigation for pasture only, and that he has never been denied water to irrigate "all I could reach. I've never had anybody tell me I couldn't irrigate the ground." [6]

---

[6] Tr. p. 169.

CLAIM NO. 4

CLAIMANT, HOMER BLOMBERG, SR.

P.O. Box 229, Riverton, Wyoming 82501

Acres claimed: 15.47

Acres awarded: 15.00

Acre-feet Per Year Awarded: 45

Priority Date: March 18, 1905

Township 1 South, Range 4 East of the W.R.M.

Section 10: E½NW¼NW¼

Mr. Blomberg's evidence was more than adequate to establish a finding that the ownership of this land has been his for far beyond twenty-one years. It was purchased by him in 1937, is served by the Left Hand Canal of the Federal Irrigation Project, and he brings sufficient evidence of conveyance from a non-Indian in 1920 to predecessor in title.

For some reason the assessment figures in 1958 were changed from 15.47 to 15 acres and the finding will reflect that change.

The similar duty is three acre-feet per year. The award herein will be an award for 45 acre-feet per year.

CLAIM NO. 5

CLAIMANT, KENNETH AND GLADYS HANSEN

Box 55 Star Route, Arapahoe, Wyoming 82510

Total acres claimed: 152

Acres awarded: 152

Acre-feet Per Year Awarded: 456

Priority Date: March 18, 1905

C-1: *Township 1 South, Range 1 East of the W.R.M.*

Section 1: E½SE¼

Acres claimed: 42

C-2: *Township 1 South, Range 1 East of the W.R.M.*

Section 11: W½NW¼

Acres claimed: 71

C-3: *Township 1 South, Range 1 East of the W.R.M.*

Section 12: NW¼NE¼

Acres claimed: 39

Claimants testimony is sufficient to establish that all three of these parcels were one allotted and I find that the record is sufficient to prove claimants' title derived from an Indian allottee.

This claimant, as with the prior claims has established a sufficient record to warrant state water rights with similar priority date of those of other Federal Irrigation Projects to the total acreage of 152 acres as testified to by claimant. Lands are served by the Coolidge Ditch out of the Little Wind River.

CLAIM NO. 6

CLAIMANT, JAMES NIRIDER

Box 62, Arapahoe, Wyoming 82501

Total Acres claimed: 248.46

Acres awarded: 248.46

Acre-feet Per Year Awarded: 745.38

Priority Date: March 18, 1905

F-1: *Township 1 South, Range 1 East of the W.R.M.*

Section 2: E½SE¼, and SE½NE¼

Acres claimed: 72.0

F-2: *Township 1 South, Range 2 East of the W.R.M.*

Section 7: SE¼NW¼, and Lot 2

Acres claimed: 79.16

F-3: *Township 1 South, Range 1 East of the W.R.M.*

Section 35: E½SE¼

Acres claimed: 97.3

Mr. Nirider testified that he purchased certain parcels of his tracts as early as 1948. They were then fee land and he broke out the full eighty acres from sagebrush; his crops were alfalfa and small grain and some pasture; and he testified that it has been continuously irrigated since acquisition.

Remaining lands were purchased at a later date, all of which receive deliveries from the Coolidge Ditch.

Regular assessments were made and his water bill paid annually to the Bureau of Indian Affairs.

As with prior claims, the State maintains that a complete chain of title cannot be established for this land and that the courts should not verify current ownership because of the fact that there have been some voids between the evidence that the land was once allotted, but that actual title transfer to the non-Indian was not from the allottee but from the United States.

Once again I will assert that that does detract from the basic proposition that these were allotted lands, ultimately came into the ownership of non-Indians, and have been receiving water by payment for O&M therefor, delivered with acquiesence of the State Engineer, and by cooperation of the federal irrigation projects which operate under virtue of a State permit and that Wyoming's objections thereto are not sufficient to override the granting of a State awarded water right for these claimants.

Even the State of Wyoming Proof of Appropriation indicates a beneficial use of water was completed as early as 1916 on some portions of the Nirider property. Other documentary evidence supports that that particular sixty acres in the E½SE¼ were irrigated in 1921. So as with other claimants, the evidence here is found to be sufficient to justify the award.

CLAIM NO. 7

CLAIMANT, THOMAS REED

P.O. Box 45, Lander, Wyoming 82520

Total Acres claimed: 115 (170 less 55, G-1)

Acres awarded: 115

Acre-feet Per Year Awarded: 345

Priority Date: March 18, 1905

G-1: *Township 1 South, Range 1 East of the W.R.M.*

Section 15: S½NW¼

Acres claimed: 55

G-2: *Township 1 South, Range 1 East of the W.R.M.*

Section 22: S½NE¼

Acres claimed: 60

G-3: *Township 1 South, Range 1 East of the W.R.M.*

Section 22: N½NW¼

Acres claimed: 55

Mr. Reed testified that there is at present an adjudicated state water right on his tract known as G-1, which is 55 acres, so his total was reduced accordingly by 55 acres already under state adjudication. Some rights on other of his acreage expired or were cancelled in 1963, the record is unclear which.

It also shows that in G-2 of the 80 acres there, the claimant testified that it is "mostly swamp land. There's 4.4 acres of water billed on that." Wyoming urges that the 60 acre claim be reduced to 4.4 acres. I think not.

It is not necessarily true that he irrigates that particular tract on purpose. It being swamp land would indicate that nothing can be done about it, one way or the other.

All three parcels received BIA water through the Coolidge Ditch. Mr. Reed has pointed up one of the very real problems that should have been faced by Wyoming decades ago, but was left to be unravelled in this most awesome mainstream adjudication. This is simply the confusion that can ensure from an irrigation project of many tracts of lands, some owned by Indians and receiving 1868 water; some leased by Indians to non-Indians enjoying the 1868 water; said tracts being located near fee lands owned by non-Indians with a 1905 date on the same canal and the same times for irrigation. To quote Mr. Reed:

> "No, I don't think I need a 1905. I think I ought to have an 1868 water right on my three parcels. It comes down the ditch, you've got a checkerboard pattern, and I don't see how you can separate the water without it causing mass confusion. If you have a split deal on your water, you're short on water, like we are occasionally. You're going to have a piece of fee land that (sic) gonna have to wait until the 1868 priority is served, and, like I've got a lot of leased land that's going to get 1868 priority, and above me there's going to be somebody with fee land that, say, has a 1905 priority. And like last year, for instance, last spring our water came pretty late and it was pretty hard to get. There were a lot of people with real late water and they had a hell of a time, pardon my language. But if we run into that situation, which I'm sure we will, then I'm gonna be calling for that 1868 priority on leased land and I'm sure other people are going to be doing the same thing. And consequently, those people with fee land, including myself, we're going to have to

wait until everything else is served. And that situation there right now, that's not down the road ten years or a hundred years from now.

This reflects what has been asserted repeatedly by State experts that "strict supervision" will be necessary in Water Division 3, and I cannot depart from the general proposition that a purchased reversed right owner under *Walton* doctrines cannot acquire an 1868 date in Wyoming. For reasons stated and repeated in both the original Report filed December 15, 1982 and in this Supplemental Report, this 1905 date is applied.

CLAIM NO. 8

CLAIMANT, DONALD BATH;
DHB & CO., and PLB & CO.

Star Route, Box 95, Arapahoe, Wyoming 82510

Total Acres claimed: 492.95

Acres awarded: 459.70

Acre-feet Per Year Awarded: 1380

Priority Date: May 5, 1905

B-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 13: E½NE¼

Acres claimed: 78.1

B-2: *Township 1 South, Range 3 East of the W.R.M.*

Section 14: E½NW¼

Acres claimed: 78.85

B-3: *Township 1 South, Range 3 East of the W.R.M.*

Section 14: SW¼NE¼ and NW¼SE¼

Acres claimed: 74.2

B-4: *Township 1 South, Range 3 East of the W.R.M.*

Section 14: SE¼NE¼ and NE¼SE¼

Acres claimed: 69.3

B-5: *Township 1 South, Range 3 East of the W.R.M.*

Section 15: N½NE¼

Acres claimed: 74.25

B-6: *Township 1 South, Range 3 East of the W.R.M.*

Section 16: SE¼NE½ (33.25 acres)
Section 21: E½NE¼ (25.00 acres)

Acres claimed: 58.25

B-7: *Township 1 South, Range 3 East of the W.R.M.*

Section 22: NW¼

Acres claimed: 60

The credible evidence is that Parcels B-1 and B-4 were purchased by the claimant from his father in 1978. Claimant's father purchased said parcels in 1962. Parcels B-5, B-2 and B-3 were purchased by claimant in 1960 from Mr. Vincent of Riverton, who in turn owned it since 1924. Parcels B-6 and B-7 were purchased by claimant in 1973 from Mr. Henry Bloom, Cheyenne, who had owned said parcels for 20 years.

These lands are served out of the Sub Agency. Claimant testifies that all acreage being claimed is irrigable except for where his house stands and except for easements and rights-of-way, and is currently being irrigated. Testimony indicates that these lands were irrigated prior to purchase except the 80 acres of Parcel B-6 and the 37.5 acres of Parcel B-7. Parcel B-6 had been irrigated at one time, but not when purchased. Ditches were already there and claimant leveled part of the parcel, began irrigating in 1973, is now irrigating about 25 acres.

Mr. Griffith testified that this land has been under irrigation as far back as 1920. I have accepted Mr. Bath's testimony that 60 acres are presently being irrigated in B-7 and based the award on that figure; and on 25 acres in B-6 because 33.25 acres in B-6 are under an existing adjudicated certificate.

CLAIM NO. 9

CLAIMANT, BRADFORD BATH

Star Route, Box 95, Arapahoe, Wyoming 82510

Total Acres claimed: 79.0

Acres awarded: 79.0

Acre-feet Per Year Awarded: 237

Priority Date: May 5, 1905

A-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 14: W½SW¼ (except 2.76 acres)

Acres claimed: 79.0

Claimant purchased this land from Thorough Rounds in 1979, who purchased it from Alex Webber in 1947. It consists of 79 acres, all of which is currently irrigated. The testimony of claimant's father, Donald Bath, indicates this land was continuously irrigated since his son took possession and the family has lived there since 1956.

CLAIM NO. 10

CLAIMANT, ARTHUR AND WANDA LUCAS

Box 22, Star Route, Arapahoe, Wyoming 82510

Total Acres claimed: 31

Acres awarded: 31

Acre-feet Per Year Awarded: 93

Priority Date: May 5, 1905

O-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 17: SW¼SE¼

Acres claimed: 19

O-2: *Township 1 South, Range 3 East of the W.R.M.*

Section 20: Westerly 990′ of E½NE¼

Acres claimed: 12

Both Parcels O-1 and O-2 are served by the Sub Agency Ditch.

Claimant irrigates and pays O&M on 19 acres of Parcel O-1 and irrigates and pays O&M on 12 acres of Parcel O-2. He testified that both parcels have been irrigated since 1940. Mr. Griffith also testified that this land has also been under irrigation as far back as 1920. Since nothing appears to indicate that any other of the Claimant's 99.15 acres in Section 17 was ever irrigated, only the O-1 acreage was considered.

CLAIM NO. 11

CLAIMANT, HENRY AND VIOLET LEWIS

Arapahoe Route, Box 3060, Riverton, Wyoming 82510

Total Acres claimed: 62

Acres awarded: 62

Acre-feet Per Year Awarded: 186

Priority Date: May 5, 1905

N-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 12: E½SE¼

This acreage is currently served by the Sub Agency.

Mr. Lewis testified that his land (Parcel N-1) consists of a total of 80 acres, and he irrigates 62 acres. He has owned this land since 1940; has irrigated it every year thereafter; and has paid an assessment every year. He has grown beans, beats, hay, grain and corn on the land.

A corroborating witness (Mr. Griffin) testified that this land was owned by a Mr. Adams in 1920-25, and that approximately 65-70 acres was under irrigation at that time.

CLAIM NO. 12

CLAIMANT, GRIFFIN BROTHERS, INCORPORATED
by HERSCHEL GRIFFIN

Box 322, Riverton, Wyoming 82501

Total Acres claimed: 456

Acres awarded: 100

Acre-feet Per Year Awarded: 300

Priority Date: March 18, 1905

P-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 1: S½ of Lot 1, SE¼NE¼, N½NE¼, N½NE¼SE¼

Acres claimed: 5

P-2: *Township 1 South, Range 3 East of the W.R.M.*

Section 1: SW¼NE¼, N½NW¼, SE¼, S½ of Lot 2 (NW¼NE¼)

Acres claimed: 10

P-3: *Township 1 South, Range 4 East of the W.R.M.*

Section 7: Lot 1 (NW¼NW¼), NE¼NW¼, NW¼NE¼

Acres claimed: 85

P-4: *Township 1 South, Range 4 East of the W.R.M.*

Section 16: Lot 3 (SW¼NW¼, W½SW¼)
Section 17: Lot 2, Lot 3, E½SE¼

Acres claimed: 170

P-5: *Township 1 South, Range 4 East of the W.R.M.*

Section 17: NE¼SE¼, NW¼SE¼

Acres claimed: 61

P-6: *Township 1 South, Range 4 East of the W.R.M.*

Section 17: SW¼SE¼
Section 20: NW¼NE¼

Acres claimed: 30

P-7: *Township 1 South, Range 4 East of the W.R.M.*

Section 19: SE¼NW¼, SW¼NE¼, NW¼SE¼, NE¼SE¼

Acres claimed: 95

Parcels P-1 and P-2 are currently irrigated for winter pasture, as land is seepy and the O&M assessment has been reduced. From the total 160 acres, claimant doubts if over 15 acres are assessed. The allottee for these parcels is unknown; however one Hamon Lacy purchased this land from the allottee and broke it out of sagebrush.

Claimant's father bought Parcel P-3 from the allottee in 1920 or 1919; broke out of sagebrush year after purchase and the land (85 acres) had been irrigated continuously since then.

The allottee of Parcel P-4 is unknown. Claimant purchased this parcel from P.J. O'Connor of Casper in 1947 and 170 acres has been under irrigation.

Parcel P-5 (61 acres) and Parcel P-6 (30 acres) was also purchased by Claimant from P.J. O'Connor in 1947.

Parcels P-1, P-2 and P-3 are serviced by the Sub Agency Ditch and the Left-Hand Ditch, and the Claimant pays assessment charges on these parcels. Parcels P-4, P-5, P-6 and P-7 are served by a private ditch called the Double Ditch. This private ditch was built by P.J. O'Connor in approximately 1925 and takes water from the Little Wind River below the Popo Agie, where they come together. Claimant testifies that irrigation started then. C.C. Barnes, previous owner of P-7, testifies that

he has been familiar with land since 1925 and that it has been under irrigation since then.

Double Ditch serves P-4 through P-7 on a "State permit" but these acres have been termed adjudicated acres. Therefore, the acreage of said tracts totaling 356 acres is deleted from an award herein. The claim for a 1868 date on this adjudicated certificate is denied, and the remaining 62 acres is awarded a 1905 date.

CLAIM NO. 13

CLAIMANT, DON VAN RIPER

Route 61, Box 63, Lander, Wyoming 82601

Total Acres claimed: 54

Acres awarded: 54

Acre-feet Per Year Awarded: 162

Priority Date: March 18, 1905

K-1: *Township 1 South, Range 2 East of the W.R.M.*

Section 6: Lot 4 ($NW\frac{1}{4}NW\frac{1}{4}$)
Lot 5 ($SW\frac{1}{4}NW\frac{1}{4}$)

This acreage (K-1) is served by Coolidge Ditch system.

Claimant has owned this acreage, consisting of a total of 80 acres, since 1964. He states that 54 acres are irrigable and have been continuously irrigated since he bought it in 1964. Claimant states that he pays O&M charges on 23 acres, but "there's another assessment that they haven't charged me for yet." [7]

This is sufficient evidence to award the right requested by Mr. Van Riper.

---

[7] Tr. p. 282.

CLAIM NO. 14

CLAIMANT, RALPH AND EILEEN URBIGKIT

Crowheart, Wyoming 82512

Total Acres claimed: 325.7

Acres awarded: 325.7

Acre-feet Per Year Awarded: 977

Priority Date: April 27, 1905

I-1: *Township 4 North, Range 4 West of the W.R.M.*

Section 2: E½SW¼

I-2: *Township 4 North, Range 4 West of the W.R.M.*

Section 2: SW¼SW¼

Acres claimed, both I-1 and I-2: 96.3

I-3: *Township 4 North, Range 4 West of the W.R.M.*

Section 2: SW¼NW¼

I-4: *Township 4 North, Range 4 West of the W.R.M.*

Section 2: SE¼NW¼

Acres claimed, both I-3 and I-4: 31.4

I-5: *Township 4 North, Range 4 West of the W.R.M.*

Section 16: S½NE¼, SE¼NW¼

Acres claimed: 94

I-6: *Township 4 North, Range 4 West of the W.R.M.*

Section 16: N½SE¼, NE¼SW¼

Acres claimed: 104

Claimant Ralph A. Urbigkit testified that parcels I-1, I-2, I-3 and I-4 are served by Wind River Ditch No. 2,

and parcels I-5 and I-6 by Dry Creek Canal. There appears to be no state-awarded water permits on any of these parcels; however, Tommy King of the State Engineer's office personally inspected and mapped out the Claimants' acreages he thought to be irrigable, as part of my reinstatement work," according to claimant Urbigkit.[8] Claimant further states that he has continuously irrigated since prior to December 31, 1963 those acreages of his "that are expired".[9]

Exhibit T-4 dealing with Parcels I-1 and I-2 was admitted during his testimony. Claimant has owned these parcels since 1966 or 1967, but they have been in the family since 1934, and claimant's father farmed this land with a partner in 1921. Of the total 120 acres, 96.3 acres are being claimed as irrigated. Little Dry creek runs half a mile through this land, but there are no roads, ditches or easements.

As to Parcels I-3 and I-4, claimant states that he purchased these between 1967 and 1970 from an enrolled member of the Tribe, John LeClair, who purchased them from the allottee. This acreage was not under irrigation when LeClair bought it and claimant states that he put 31.4 acres into irrigation and has continually irrigated it since (however, no date was given).[10]

Claimant's parents purchased Parcels I-5 and I-6 in 1941. Claimant states that said parcels were completely cultivated between 1941 and 1944 and were not being irrigated prior to 1941, even though recapitulation of the Goodwin Certificates [11] indicate dates of May 31, 1922 and June 8, 1922 for Parcels I-5 and I-6 respectively as the dates water could have been available for irrigation,

---

[8] Tr. p. 290.

[9] Tr. p. 295.

[10] Tr. p. 289.

[11] Phifer's Exhibit T-5.

but not necessarily the dates water was requested.[12] Parcel I-5 currently includes 94 irrigated acres for which claimant pays assessments; and Parcel I-6 includes 104 irrigated acres.

On about half of this acreage, evidence presented on behalf of the Tribes in this adjudication shows that land was once allotted, and Wyoming agrees that title is thus derived from an Indian allottee. But on the 96.3 acres of I-1 and I-2, Wyoming maintains that the actual title transfer to a non-Indian was not from an allottee, but from the United States, and that therefore the chain of title is insufficient to prove derivation from an allottee.

We have considered this objection in other claimants cases and have decided against it. We do so here.

The award is for all land claimed.

---

[12] Tr. pp. 293, 294.

CLAIM NO. 15

CLAIMANT, DALE AND PATRICIA URBIGKIT

Wyoming

Total Acres claimed: 265

Acres awarded: 195

Acre-feet Per Year Awarded: 585

Priority Date: April 27, 1905

H-1: *Township 4 North, Range 4 West of the W.R.M.*

Section 4: SW¼NE¼, NW¼SE¼, Lot 6

Acres claimed: 65

H-2: *Township 4 North, Range 4 West of the W.R.M.*

Section 4: W½, S½NW¼, S½ of Lot 3, S½ of Lot 4

Acres claimed: 200

The Claimant prior (Claim No. 14, Ralph K. Urbigkit) is the father of the claimants in this and the following matter (Claims No. 15 and 16). Ralph Urbigkit testifying to his son, Dale Urbigkit's property, said that parcel H-1 has 65 acres that are irrigated and which were probably irrigated since 1937-38, and that parcel H-2 has 200 irrigated acres out of a total of 284.6 acres. Parcel H-2 was acquired by this his son from the estate of John L. Miller in 1975, was irrigated before 1975, was purchased from Neida Large and Mrs. Joseph Calhoun, original allottees during the ten year span in 1950's, and that it was irrigated prior by allottees.

During the father's testimony, he said that, "The land that my son owns has adjudicated water rights, but the

land I own has never. . . ." [12] Unfortunately no one asked which son he was testifying about and this required a search of the records of the State Engineer's office where it was found that, as originally filed by an uncle of the Urbigkit family, John L. Miller, there were indeed adjudicated certificates as follows:

Item	Acres	Land
1	9.28	W½NW¼NE¼
2	4.00	E½NE¼SE¼
3	30.00	SW¼NE¼
4	12.50	W½NE¼SE¼
5	40.00	NW¼SE¼
6	11.25	SE¼SE¼
TOTAL	107.30	

The land in Items 3 and 5 above, totalling 70 acres, is described and claimed in this matter. Since this land already enjoys a higher water right in the form of a valid adjudicated certificate, these 70 acres have been stricken from the totals granted herein. The remaining 195 acres is granted a State permit award with a priority date accordingly. All of these lands are served by the Dry Creek Canal.

[12] Tr. p. 230.

CLAIM NO. 16

CLAIMANT, RALPH FLOYD URBIGKIT

Crowheart, Wyoming 82512

Total Acres claimed: 259.60

Acres awarded: 153.85

Acre-feet Per Year Awarded: 461.55

Priority Date: April 27, 1905

J-1: *Township 4 North, Range 4 West of the W.R.M.*

Section 11: SE¼, SE¼NE½

Acres claimed: 153.85

J-2: *Township 4 North, Range 4 West of the W.R.M.*

Section 15: NW¼NE¼, N½NW¼

Acres claimed: 105.75

Claimant Ralph F. Urbigkit testified in his own behalf in support of the above claims. He said parcel J-1 is served by the Wind River Ditch No. 2 and parcel J-2 by the Dry Creek Canal, and that certain lands were purchased in 1955 from John L. Miller, who was identified earlier as an uncle of the Urbigkit family.

Once again it was necessary to refer to the official records of the State Engineer's Office, which revealed that exactly 105.7 acres in Section 15 (with identical descriptions as in the above claim) were issued adjudicated ceritficates upon application of John L. Miller. This claim is thus reduced accordingly, and granted.

CLAIM NO. 17

CLAIMANT, JOHN (JR) and
BARBARA LONGFELLOW

Box 46, Star Route Arapahoe, Wyoming 82510

Total Acres claimed: 225

Acres awarded: 225

Acre-feet Per Year Awarded: 675

Priority Date: March 18, 1905

Township 1 South, Range 2 East of the W.R.M.

Section 8: NE¼NE¼
Section 9: W½NW¼, NE¼NE¼
Section 16: SW¼SW¼
Section 17: SE¼SE¼

Acres claimed: 240 (225 net)

This was perhaps the clearest presentation to justify an award. Mr. Longfellow testified to and described the 225 net acres which he irrigates annually. He had with him certified warranty deeds of conveyance from the original Indian allottee to the first non-Indian owner, and evidence of his having irrigated and owned the lands for over half a century. His case also included statements of a neighbor giving weight to the fact that the land had been irrigated since the 30's.

The land is served by the Coolidge Project and is awarded a State permit accordingly.

CLAIM NO. 18

CLAIMANT, VERL SNEED and
HOMER BLOMBERG, JR.
by ANNA MERLE BLOMBERG

P.O. Box 229, Riverton, Wyoming 82510

Total Acres claimed: 35

Acres awarded: 35

Acre-feet Per Year Awarded: 105

Priority Date: March 18, 1905

Township 1 South, Range 4 East of the W.R.M.

Section 9: NE¼NE¼

Mrs. Anna M. Blomberg testified in behalf of her son, Homer Blomberg, Jr., and her brother, Verl Sneed, who own a one-fourth and a three-fourths interest in this tract, respectively. The original Indian allottee was identified as John Little, and after his demise, the land was conveyed to "a whole bunch of people," [14] until acquired by the present owners or their immediate family members in the thirties. Mrs. Blomberg recalled that these land were receiving annual irrigation as early as 1930.

The claim is granted.

---

[14] Tr. p. 314.

CLAIM NO. 19

CLAIMANT, KATHRYN LINDEN DICKINSON

Route 2, Box 555, Riverton, Wyoming 82510

Total Acres claimed: 16

Acres awarded: 16

Acre-feet Per Year Awarded: 48

Priority Date: May 5, 1905

Township 1 South, Range 3 East of the W.R.M.

Section 17: SE¼SE¼

This land is served by Sub-Agency and is located about three miles west of the Arapahoe School House. Claimant's husband and his father bought in 1938 (originally 200 acres) 100 acres of which is now owned by Mr. Lucas.[15] The land was purchased from one Benjamin Warren, who purchased it from an Indian allottee whose last name was Friday.

This is a claim for 16 acres under irrigation and for which O&M assessment has been paid annually for many years. A State permit for 16 acres is approved.

---

[15] See Claim No. 10 herein.

CLAIM NO. 20

CLAIMANT, KENNETH AND PATRICIA PERSSON

680 Bonnie Brae, Lander, Wyoming 82520

Total Acres claimed: 100

Acres awarded: 70

Acre-feet Per Year Awarded: 210

Priority Date: March 18, 1905

Township 1 South, Range 1 West of the W.R.M.

Section 25: W½SE¼, E½SW¼

Mr. Persson testified that he irrigates approximately 100 acres of his land, although "I pay irrigation water (sic) for seventy acres".[16]

The Claimant acquired this acreage in relatively recent years, and presented as proof of Indian allottee origin, a commitment of title insurance which showed a chain of title containing the name of Ernest L. Posey as apparently the original Indian allottee. This land was under cultivation when acquired by Mr. Persson in 1976 and 1977.

The acreage is served by the Ray Canal.

The claim is reduced accordingly, and granted.

---

[16] Tr. p. 322.

CLAIM NO. 21

CLAIMANT, CHARLES RICHARDSON

Arizona

Total Acres claimed: 60

Acres awarded: 60

Acre-feet Per Year Awarded: 180

Priority Date: April 27, 1905

R-1: *Township 4 North, Range 3 West, of the W.R.M.*

Section 28: $SE\frac{1}{4}SW\frac{1}{4}$, Lot 6 ($NW\frac{1}{4}SW\frac{1}{4}$), Lot 11 ($SE\frac{1}{4}NW\frac{1}{4}$)

Section 33: $N\frac{1}{2}NE\frac{1}{4}NW\frac{1}{4}$

The absence of Mr. Charles Richardson from the Courtroom during these proceedings made it very difficult to ascertain first-hand all the information needed to establish a rounded basis for an accurate award to him. He was represented by his attorney, Mr. Phifer, who brought out that the claimant was ill and in Arizona at the time of the hearing. Facts necessary to support, even minimally, a claim for water were adduced by questioning Mr. Ralph Urbigkit, a lifelong resident of the area and long identified as one familiar with the Soil Conservation Service and with agriculture generally in the area and particularly with the Richardson land.

In describing one aerial photograph, it would appear that Mr. Richardson had considerably more than 60 acres under irrigation; but there is nothing in the record to justify a larger grant in these proceedings. The witness testified that Mr. Richardson acquired title directly from an Indian allottee in 1936 and this is corroborated in part by Mr. Clear, counsel for the United States. A novel point was raised by Mr. Clear in that the Indian received

a fee patent in 1925 and sold it in 1936, so it was not in trust status for eleven years. Therefore the question becomes whether the Indian himself has to track his due diligence in putting the land under irrigation or does he lose his reserved right? I decline to address this question, yet another *Walton* nuance.

It appears that there is sufficient evidence here to justify an award of water for 60 acres with a Dry Creek priority date, and this was done.

CLAIM NO. 22

CLAIMANT, DR. AND MRS. RICHARD D. MARTIN

Box 637, Crowheart, Wyoming 82512

Total Acres claimed: 80

Acres awarded: 53.6

Acre-feet Per Year Awarded: 161

Priority Date: April 27, 1905

E-1: *Township 4 North, Range 5 West, of the W.R.M.*

Section 36: W½NW¼ and NW¼SW¼

A detailed and intricate cross-examination by Mr. Clear resulted in a downward adjustment of 16.4 acres from an original 80-acre figure. This was a cancellation of certain lands from the Ansel Ditch, an occasion recalled by the claimant and confirmed by him.

There is no question of the strength of this claim. Dr. Martin's family ownership of the land was traced to the first construction of an irrigation ditch, a private ditch, "which was in existence when my father-in-law purchased the property from an Indian, a patentee Indian in 1917." [17]

Permits were applied for but neither granted nor denied, according to Dr. Martin. They may be expired, but could still be adjudicated. There was no evidence of interruption of irrigation in the intervening 66 years.

This is one of the classic fact situations that warrants a permit, with a priority date of the nearest Indian project diversion.

---

[17] Tr. p. 392.

CLAIM NO. 23

CLAIMANT, ROBERT PERALTA

Red Creek Ranch, Crowheart, Wyoming 82512

Total Acres claimed:	456 (see discussion below)
Acres awarded:	306
Acre-feet Per Year Awarded:	918
Priority Date:	1905

It is most difficult from a study of the transcript to determine the acreage of this claim. When Mr. Ralph Urbigkit described in his testimony the acreage irrigated in 1934 by lot numbers, he referred to a map which was specifically excluded from evidence.

Witness Urbigkit said as of 1934 there were 361.02 acres irrigated. This did not include the acreage in a given Section 18 which the claimant testified he did not own. Mr. Urbigkit later pointed out that about 150 acres of land irrigated in 1934 has since gone out of irrigation. One can conclude that the 150 acres should be excluded from the 361.02, but there is no factual certainty that this is the case. To add to this clutter, Mr. Phifer acknowledged that the total claim is 306 acres, but this does not coincide with the 361.02 acreage figure provided by Mr. Urbigkit and the location of the 306 acres is not clear or decipherable on the record. Assuming that the legal description provided by Mr. Phifer, which was not in the record of these proceedings, accurately describes the claim, then the legal description is as follows:

Township 5 North, Range 5 West of the W.R.M.

Section 7: SE¼SE¼, Lot 6 (SE¼NE¼, NE¼SE¼), Lot 10 (NW¼SW¼), Lot 11 (SW¼SW¼), SW¼SE¼, Lot 8 (NE¼SW¼), SE¼SW¼

Section 8: Lot 6 ($SW\frac{1}{4}NW\frac{1}{4}$), $NW\frac{1}{4}SW\frac{1}{4}$, $SW\frac{1}{4}SW\frac{1}{4}$

Section 18: Lot 1 ($NW\frac{1}{4}NW\frac{1}{4}$), Lot 2 ($SW\frac{1}{4}NW\frac{1}{4}$), $NE\frac{1}{4}NW\frac{1}{4}$, $NW\frac{1}{4}NE\frac{1}{4}$

The record supports that all acreage claimed (if the above is correct) was once Indian allotted land. Conveyances to a non-Indian took place between May 3, 1919, and in 1931-1935 from the United States as grantor. The testimony is that this land was previously owned by an uncle of the Urbigkit family, John L. Miller, a grantor in several other claimants' cases. The evidence is clear that the land was irrigated in 1934 and that about 456 acres undescribed are assumed to be currently irrigated by the claimant. This was corroborated by Mr. Urbigkit also.

There is evidence that Mr. Miller purchased the land from a Mr. McFarland who acquired, before the land was opened for settlement, certain tracts from a conveyor named Whiskey Jack. There are deeds to indicate that the entire property was granted from an Indian allottee, but the evidence is also clear that certain tracts were conveyed by the United States after a break in chain from allotment status.

Mr. Clear for the United States asserts that Whiskey Jack's allotment was a non-irrigable one because it was not within the project and therefore a 1905 permit should not be awarded herein, but that a 1919 or 1930 date would be appropriate. I find it difficult to make an exception in this case when I have ruled in numerous claims so far that if the land was originally an allotment and a part of the Reservation, the 1905 date should apply. Therefore the claim is granted.

CLAIM NO. 24

CLAIMANT, LANDIS WEBBER FOR RED CREEK CATTLE COMPANY

Wyoming

Total Acres claimed: 274

Township 8 North, Range 2 East of the W.R.M.

Section 5: Lot 2 ($NW\frac{1}{4}NE\frac{1}{4}$)
Lot 3, $SE\frac{1}{4}NW\frac{1}{4}$

This is a continuation of perhaps the most celebrated water case in Wyoming. The claim of Landis Webber is to in effect move a series of 1905 adjudicated certificates which he has long enjoyed to be ordered changed to an 1868 reservation date priority, although he would accept a 1898 date, which was the date of the first application for beneficial use of water by the Duncan children.

This claim is *res adjudicata*, and as such, having been rejected in *Merrill v. Bishop*,[18] I can make no finding on this issue. Further, see page 5 of this Report, *supra*.

---

[18] *Merrill v. Bishop*, ibid.

CLAIM NO. 25

CLAIMANT, BERTHA LEE JONES

Wyoming

Total Acres claimed: 240

Township 9 North, Range 2 East of the W.R.M.

Section 35: SE¼NW¼, Lot 1 (NE¼NW¼), W½SE¼, W½NE¼

This also is claim to in effect move a series of 1905 adjudicated certificates to be ordered changed to an 1868 reservation date priority.

This claim is *res adjudicata*, and as such, having been rejected in *Merrill v. Bishop*,[19] I can make no finding on this issue. Further, see page 5 of this Report, *supra*.

[19] *Merrill v. Bishop*, ibid.

CLAIM NO. 26

CLAIMANT, GRACE GRABOSKI

Wyoming

Total Acres claimed: 200

Township 9 North, Range 2 East of the W.R.M.

Section 35: Lot 3 ($SE\frac{1}{4}NW\frac{1}{4}$), $W\frac{1}{2}SW\frac{1}{4}$, $E\frac{1}{2}SW\frac{1}{4}$

This also is claim in effect to move a series of 1905 adjudicated certificates to be ordered changed to an 1868 reservation date priority.

This claim is *res adjudicata*, and as such having been rejected in *Merrill v. Bishop*,[20] I can make no finding on this issue. Further, see page 5 of this Report, *supra*.

---

[20] *Merrill v. Bishop*, ibid.

E. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In general, I find that Wyoming and the United States, to the same degree, have acquiesced for decades and in some instances for nearly half a century, in the delivery of irrigation water year after year to record owners of the one-time Indian allotment lands involved in each of the Claims Nos. 1 through 23 in Part I of this Final Report. Often permits had expired but water continued to be delivered and applied to beneficial use. Often operation and maintenance charges continued to be assessed to owners annually and water delivered annually.

2. I therefore find that both the State of Wyoming and the United States are estopped from denying claims of defendants in Claims Nos. 1 through 23 herein, by virtue of the above acquiescence, by virtue of the absence of supervision by Wyoming, the issuance of Goodwin Certificates by the United States, and in their practice concurred in for so many years that non-Indians on the Wind River Indian Reservation who took from an allottee need not get a state permit.[1]

3. All findings of fact contained in the Report dated December 15, 1982, dealing with reserved water rights affecting alienated lands, be and the same are hereby made a part hereof.

4. With respect to all claims Nos. 1 through 23, the Court finds that the identified land of each claimant:

(a) Was originally a part of the Wind River Indian Reservation, and was alienated therefrom by virtue of the General Allotment Act.

(b) Had been regularly irrigated beginning with the date and for the periods mentioned in each claim discussed, and the water thereon put to beneficial use.

---

[1] Exs. T-5, T-6.

5. With respect to all claimants under claims Nos. 1 through 23, the Court finds that such claimants or their non-Indian precedessors expected to use water either from a Federal irrigation Project, or from other available sources, when they purchased their land.

6. That claims Nos. 24, 25 and 26 are res judicata and are therefore without merit.

7. The findings of fact for each claimant are as follows:

CLAIM NO. 1

CLAIMANT, RUDY AND NANCY ZUPENCE

Acres claimed: 50

Township 1 South, Range 1 West of the W.R.M.:

Section 5: NE¼SW¼, N½SE¼SW¼, W½SE¼SE¼SW¼

This claim is fifty acres under irrigation, is under permit, but is currently expired.[2] It has been irrigated since prior to 1963 and every year subsequent thereto. The property was irrigated by the Indian allottee, Mr. Surrell, prior to 1955, and the whole tract was put under irrigation upon being purchased by John Meridith in 1955.[3]

---

[2] Ex. T-1.

[3] Tr. pp. 192, 193.

CLAIM NO. 2

CLAIMANT, ALBERT HORNECKER

Acres claimed: 420.97

Parcel and Land Description [4]	Acreage	Award
Section 21: SW¼SW¼	38.85	116.55
Section 27: N½NW¼	64.25	192.75
Section 28: NE½SE¼	77.75	233.25
Section 28: SW¼SE¼, SE¼SW¼	69.99	209.97
Section 29: SE¼SW¼	31.70	95.13
Section 32: NW¼NE¼	35.61	106.83
TOTALS	318.15	954.48

The 38.85 acres is presently under an expired state permit and has been irrigated prior to December, 1963, and continuously thereafter.[5] The 64.25 acre tract is not currently under any state permit but has also been irrigation prior to 1963 and continuously since. The 77.75 acre tract is not contained under any state permit, was purchase for irrigation, and a little less than 80 acres was broken out of sagebrush in 1923 and 1924. The 69.99 acre tract currently has two acres under state permit; was broken out of sagebrush in 1942 and 1943 with approximately 78 acres broken out and farmed.[6] The property has been irrigated prior to December 31, 1963, and to the present date by Albert Hornecker.[7]

The 31.70 acre parcel has been irrigated by Albert Hornecker since prior to December 31, 1963 and is pres-

[4] All claims are in Township 1 South, Range 1 East of the Wind River Meridian.

[5] Tr. p. 158; Ex. T-1.

[6] Tr. p. 185.

[7] Tr. p. 158.

ently expired under state permit. As much as 25 acres were irrigated as early as 1916 or 1917.[8] The 35.61 acre parcel is presently expired under state permit, was irrigated by Albert Hornecker prior to December 31, 1963. About 35 acres were irrigated as early as 1916 to 1917.[9]

CLAIM NO. 3

CLAIMANT, CHARLES M. ROEMER

Acres claimed: 53

Township 1 South, Range 1 West of the W.R.M.

Section 5: S½NW¼SE¼, NW¼NW¼SE¼, SW¼SE¼

Mr. Roemer's tract contains some land that is higher than the ditches delivering water, includes other non-irrigable portions, and in 1981, the Bureau of Indian Affairs reduced acreage of this claimant from 53 to 24 or 25 acres, and reduced charges accordingly. There are no crops and the flood irrigation is for pasture only.

CLAIM NO. 4

CLAIMANT, HOMER BLOMBERG, SR.

Acres claimed: 15.47

Township 1 South, Range 4 East of the W.R.M.

Section 10: E½NW¼NW¼

This land was purchased by the claimant in 1937, is served in a Federal Irrigation Project and was originally conveyed to a non-Indian in 1920. Assessment figures in

---

[8] Tr. pp. 173, 174.

[9] Tr. pp. 174, 1975.

1958 changed the 15.47 acres to 15.0 acres and this finding reflects that change.

CLAIM NO. 5

CLAIMANT, KENNETH AND GLADYS HANSEN

Total acres claimed: 152

C-1: *Township 1 South, Range 1 East of the W.R.M.*

Section 1: E½SE¼

Acres claimed: 42

C-2: *Township 1 South, Range 1 East of the W.R.M.*

Section 11: W½NW¼

Acres claimed: 71

C-3: *Township 1 South, Range 1 East of the W.R.M.*

Section 12: NW¼NE¼

Acres claimed: 39

The 42 acre tract carries a patent date of 1919, was irrigated prior to 1963 and continuously since then.[10] This property is presently expired under state permit. The 71 acre tract bears a patent date of 1909, beneficial use of water was completed in 1918.[11] The 39 acre tract is presently on an expired permit, and was irrigated as early as 1922 when 40 acres were under irrigation.

All three parcels were allotment lands.

---

[10] Tr. pp. 212, 213.

[11] Ex. C-2-2.

CLAIM NO. 6

CLAIMANT, JAMES NIRIDER

Total Acres claimed: 248.46

F-1: *Township 1 South, Range 1 East of the W.R.M.*
Section 2: E½SE¼, and SE½NE¼
Acres claimed: 72.0

F-2: *Township 1 South, Range 2 East of the W.R.M.*
Section 7: SE¼NW¼, and Lot 2
Acres claimed: 79.16

F-3: *Township 1 South, Range 1 East of the WR.M.*
Section 35: E½SE¼
Acres claimed: 97.3

The 72 acre tract is under an expired permit, has been continuously irrigated by James Nirider since prior to 1963, has a patent date of 1919, and has been irrigated continuously in the lifetime of the present owner. The 79.16 acre tract is also under an expired permit and has been irrigated since 1963 by the present owner. The 97.3 acre tract bears a patent date of 1916 and has enjoyed beneficial use of water completed in 1916 on the original 80 acres thereof. All three tracts are original allotment lands.

CLAIM NO. 7

CLAIMANT, THOMAS REED

Total Acres claimed: 115 (170 less 55, G-1)

G-1: *Township 1 South, Range 1 East of the W.R.M.*
Section 15: S½NW¼
Acres claimed: 55

G-2: *Township 1 South, Range 1 East of the W.R.M.*
Section 22: S½NE¼
Acres claimed: 60

G-3: *Township 1 South, Range 1 East of the W.R.M.*
Section 22: N½NW¼
Acres claimed: 55

All three of the Reed tracts have patent dates originating in 1912 or before, and all three were originally allotment lands and have been under continuous irrigation since as early as 1917. The later two tracts have expired state permits.

CLAIM NO. 8

CLAIMANT, DONALD BATH;
DHB & CO., and PLB & CO.

Total Acres claimed: 492.95

B-1: *Township 1 South, Range 3 East of the W.R.M.*
Section 13: E½NE¼
Acres claimed: 78.1

B-2: *Township 1 South, Range 3 East of the W.R.M.*
Section 14: E½NW¼
Acres claimed: 78.85

B-3: *Township 1 South, Range 3 East of the W.R.M.*
Section 14: SW¼NE¼ and NW¼SE¼
Acres claimed: 74.2

B-4: *Township 1 South, Range 3 East of the W.R.M.*
Section 14: SE¼NE¼ and NE¼SE¼
Acres claimed: 69.3

B-5: *Township 1 South, Range 3 East of the W.R.M.*
Section 15: N½NE¼
Acres claimed: 74.25

B-6: *Township 1 South, Range 3 East of the W.R.M.*
Section 16: SE¼SE¼ (33.25 acres)
Section 21: E½NE¼ (25.00 acres)
Acres claimed: 58.25

B-7: *Township 1 South, Range 3 East of the W.R.M.*
Section 22: NW¼
Acres claimed: 60

The 33.25 acres in the B-6 description above are under an existing adjudicated certificate, so this total was deducted from the acres claimed in the seven tracts above. All remaining lands have had patent dates beginning with 1909 through 1924; some were traced to ownership and irrigation as early as 1920; other tracts were acquired as late as 1960. B-6 and B-7 were purchased in 1973. Three of the above parcels are presently being irrigated under a state permit.

CLAIM NO. 9

CLAIMANT, BRADFORD BATH

Total Acres claimed: 79.0

A-1: *Township 1 South, Range 3 East of the W.R.M.*
Section 14: W½SW¼ (except 2.76 acres)
Acres claimed: 79.0

This property was under irrigation in 1920.[12] A 1922 agricultural report in evidence substantiates that 40

[12] Tr. p. 273.

acres were irrigated in the SW¼SW¼ at that time. The property has been continuously irrigated since 1963, was originally permitted, but long since expired.

CLAIM NO. 10

CLAIMANT, ARTHUR AND WANDA LUCAS

Total Acres claimed: 31

O-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 17: SW¼SE¼

Acres claimed: 19

O-2: *Township 1 South, Range 3 East of the W.R.M.*

Section 20: Westerly 990′ of E½NE¼

Acres claimed: 12

The patent date of the above two, former allotment parcels is 1919. The areas have had permits which are currently expired that date back to 1910. Both parcels have been under irrigation since 1920.

CLAIM NO. 11

CLAIMANT, HENRY AND VIOLET LEWIS

Total Acres claimed: 62

N-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 12: E½SE¼

The 62 acres has been owned by the claimant since 1940 and most all of the acreage has been under irrigation ever since 1920 and 1925. The original patent date was March 24, 1910, and the property is currently expired acreage under a state permit.

CLAIM NO. 12

CLAIMANT, GRIFFIN BROTHERS, INCORPORATED by HERSCHEL GRIFFIN

Total Acres claimed: 456

P-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 1: S½ of Lot 1, SE¼NE¼, N½NE¼SE¼

Acres claimed: 5

P-2: *Township 1 South, Range 3 East of the W.R.M.*

Section 1: SW¼NE¼, N½NW¼, SE¼, S½ of Lot 2 (NW¼NE¼)

Acres claimed: 10

P-3: *Township 1 South, Range 4 East of the W.R.M.*

Section 7: Lot 1 (NW¼NW¼), NE¼NW¼, NW¼NE¼

Acres claimed: 85

P-4: *Township 1 South, Range 4 East of the W.R.M.*

Section 16: Lot 3 (SW¼NW¼, W½SW¼)
Section 17: Lot 2, Lot 3, E¼SE¼

Acres claimed: 170

P-5: *Township 1 South, Range 4 East of the W.R.M.*

Section 17: NE¼SE¼, NW¼SE¼

Acres claimed: 61

P-6: *Township 1 South, Range 4 East of the W.R.M.*

Section 17: SW¼SE¼
Section 20: NW¼NE¼

Acres claimed: 30

P-7: *Township 1 South, Range 4 East of the W.R.M.*

Section 19: SE¼NW¼, SW¼NE¼,
NW¼SE¼, NE¼SE¼

Acres claimed: 95

The claimant testified that not over 15 acres are assessed of the combination of the first two tracts; one Hamon Lacy purchased this land from the original Indian allottee and broke it out of sagebrush. Claimant's father purchased the 85 acre tract from the allottee in 1920, broke it out of sagebrush the following year, and it has been irrigated continuously since then.

The 170 acre tract and other areas served by Double Ditch were part of the original P. J. O'Connor lands, and the testimony is clear that these lands are served under an adjudicated certificate. Still the owner testified that he was sure that it is under a state permit. This finding will accept the adjudicated status of said acres and deny them a 1905 right.

CLAIM NO. 13

CLAIMANT, DON VAN RIPER

Total Acres claimed: 54

K-1: *Township 1 South, Range 2 East of the W.R.M.*

Section 6: Lot 4 (NW¼NW¼)
Lot 5 (SW¼NW¼)

These acres were first patented in 1919 and the 54 acres have been owned by the claimant since 1963 and have been irrigated ever since. O & M charges are paid on only 23 acres, but the claimant testified that an additional assessment is in the process of being levied against him.

CLAIM NO. 14

CLAIMANT, RALPH AND EILEEN URBIGKIT

Total Acres claimed: 325.7

I-1: *Township 4 North, Range 4 West of the W.R.M.*
Section 2: E½SW¼

I-2: *Township 4 North, Range 4 West of the W.R.M.*
Section 2: SW¼SW¼
Acres claimed, both I-1 and I-2: 96.3

I-3: *Township 4 North, Range 4 West of the W.R.M.*
Section 2: SW¼NW¼

1-4: *Township 4 North, Range 4 West of the W.R.M.*
Section 2: SE¼NW¼
Acres claimed, both I-3 and I-4: 31.4

I-5: *Township 4 North, Range 4 West of the W.R.M.*
Section 16: S½NE¼, SE¼NW¼
Acres claimed: 94

I-6: *Township 4 North, Range 4 West of the W.R.M.*
Section 16: N½SE¼, NE¼SW¼
Acres claimed: 104

The two parcels totalling 96.3 acres were patented before 1917, were farmed by Ralph Urbigkit's father from 1921 to 1927, both properties originally permitted, but expired, and are irrigation from the Wind River Ditch by Ralph Urbigkit since prior to 1963 and every year subsequent thereto. The parcels containing a total

of 31.4 acres were purchased by Ralph Urbigkit from John LeClair, an enrolled member of the Tribe, who took from the original allottee. This property was originally permitted, but the permit has expired. It is also served by Wind River Ditch No. 2.[13]

The 94 acre tract was originally permitted, is now expired, has been irrigated by Ralph Urbigkit and his family since put under cultivation between the years 1941 and 1945. The 104 acre tract was also originally permitted, but the permit has since expired. This property has been irrigated by Ralph Urbigkit and his family since put under cultivation between the years 1941 and 1945. Goodwin Certificates in evidence indicate that much of this acreage could have been put under irrigation and that water was available thereof beginning May 31, 1922.

CLAIM NO. 15

CLAIMANT, DALE AND PATRICIA URBIGKIT

Total Acres claimed: 265

H-1: *Township 4 North, Range 4 West of the W.R.M.*

Section 4: SW¼NE¼, NW¼SE¼, Lot 6

Acres claimed: 65

H-2: *Township 4 North, Range 4 West of the W.R.M.*

Section 4: W½, S½NW¼, S½ of Lot 3, S½ of Lot 4

Acres claimed: 200

This property contains approximately 200 irrigated acres, was acquired by Dale Urbigkit's great uncle, John Miller, from the original allottees, Neida Large and Mrs.

[13] Tr. pp. 289, 290.

Joseph Calhoun. This property was irrigated prior to being purchased by John Miller from the original allottees and was originally permitted under a state permit that has since expired.

The 65 acres in Lot 6 has been irrigated since at least 1937, and 70 acres of the said property is covered in a valid adjudicated certificate and have therefore been stricken from totals granted herein.

CLAIM NO. 16

CLAIMANT, RALPH FLOYD URBIGKIT

Total Acres claimed: 259.60

J-1: *Township 4 North, Range 4 West of the W.R.M.*

Section 11: SE¼, SE¼NE¼

Acres claimed: 153.85

J-2: *Township 4 North, Range 4 West of the W.R.M.*

Section 15: NW¼NE¼, N½NW¼

Acres claimed: 105.75

Of the total 259.60 acres claimed, exactly 105.7 acres as set forth in Section 15, Township 4 North, Range 4 West of the W.R.M., are the exact 105.7 acres identified in the State Engineer's office on which were issued adjudicated certificates upon an application of John L. Miller. Therefore, this claim of 259.60 acres was reduced accordingly to an award of 153.85 acres.

CLAIM NO. 17

CLAIMANT, JOHN (JR.) and BARBARA LONGFELLOW

Total Acres claimed: 225

Township 1 South, Range 2 East of the W.R.M.

Section 8: NE¼NE¼
Section 9: W½NW¼, NE¼NE¼
Section 16: SW¼SW¼
Section 17: SE¼SE¼

Acres claimed: 240 (225 net)

The 225 acre claim herein was conveyed from an original Indian allottee to a series of non-Indian owners and has been irrigated and owned by said owners for over half a century.

CLAIM NO. 18

CLAIMANT, VERL SNEED and HOMER BLOMBERG, JR.
by ANNA MERLE BLOMBERG

Total Acres claimed: 35

Township 1 South, Range 4 East of the W.R.M.

Section 9: NE¼NE¼

The original Indian allottee of the above tract was John Little, and after his demise the land was conveyed to a series of people until acquired by its present owners in the 1930's. These lands received annual irrigation since such time.

CLAIM NO. 19

CLAIMANT, KATHRYN LINDEN DICKINSON

Total Acres claimed: 16

Township 1 South, Range 3 East of the W.R.M.

Section 17: SE¼SE¼

Claimant's husband and his father bought this land in 1938 from one Benjamin Warren who purchased it from

the Indian allottee whose last name was "Friday". Operation and Maintenance Assessment has been paid annually for many years.

CLAIM NO. 20

CLAIMANT, KENNETH AND PATRICIA PERSSON

Total Acres claimed: 100

Township 1 South, Range 1 West of the W.R.M.

Section 25: W½SE¼, E½SW¼

The evidence indicates the original Indian allottee was a person namely Ernest L. Posey. This land was under cultivation when acquired by the claimant in 1976 or 1977. The Operation and Maintenance Assessment payments are for a total 70 acres, and the claim is reduced to 70 acres accordingly.

CLAIM NO. 21

CLAIMANT, CHARLES RICHARDSON

Total Acres claimed: 60

R-1: *Township 4 North, Range 3 West, of the W.R.M.*

Section 28: SE¼SW¼, Lot 6 (NW¼SW¼), Lot 11 (SE¼NW¼)

Section 33: N½NE¼NW¼

Mr. Richardson acquired title directly from an Indian allottee in 1936.

CLAIM NO. 22

CLAIMANT, DR. AND MRS. RICHARD D. MARTIN

Total Acres claimed: 80

E-1: *Township 4 North, Range 5 West, of the W.R.M.*

Section 36: W½NW¼ and NW¼SW¼

Dr. Martin's family ownership was traced to the construction of a ditch in existence when his predecessor purchased from an Indian patentee in 1917. 16.4 acres was deleted from the claim of 80 acres and a right to water is found to exist for the remaining 53.6 acres.

CLAIM NO. 23

CLAIMANT, ROBERT PERALTA

Total Acres claimed: 456

Township 5 North, Range 5 West of the W.R.M.

Section 7: SE¼SE¼, Lot 6 (SE¼NE¼, NE¼SE¼), Lot 10 (NW¼SW¼), Lot 11 (SW¼SW¼), SW¼SE¼, Lot 8 (NE¼SW¼), SE¼SW¼

Section 8: Lot 6 (SW¼NW¼), NW¼SW¼, SW¼SW¼

Section 18: Lot 1 (NW¼NW¼), Lot 2 (SW¼NW¼), NE¼NW¼, NW¼NE¼

Acreage claims was all once Indian allotted land and beneficial use of water completed in 1919 on over 100 acres.

CLAIMS NO. 24, 25, and 26

Claims No. 24, 25 and 26 have their basis in asserting that owners of allotment lands are entitled to a treaty date priority. The matter has been addressed in *Merrill v. Bishop*, supra, and is now res judicata; these claims are therefore without merit.

F. RECOMMENDED FINAL DECREE

IN THE DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT
STATE OF WYOMING

Civil No. 4993

IN RE: IN GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING.

RECOMMENDED FINAL DECREE

IT IS ORDERED, ADJUDICATED AND DECREE, that the following claimants to the right to use water in the Big Horn River System be and the same hereby are awarded State Permits for water in the volumes and priority as set forth herein:

CLAIM NO. 1

CLAIMANT, RUDY AND NANCY ZUPENCE

Box 333, Ft. Washakie, Wyoming 82514

Acres claimed: 50

Acres awarded: 50

Acre-feet Per Year Awarded: 150

Priority Date: March 18, 1905

Township 1 South, Range 1 West of the W.R.M.:

Section 5: NE¼SW¼, N½SE¼SW¼, W½SE¼SE¼SW¼

CLAIM NO. 2

CLAIMANT, ALBERT HORNECKER

Route 61, Ethete, Wyoming

Acres claimed: 420.97
Acres awarded: 318.15
Acre-feet Per Year Awarded: 954.48
Priority Date: March 18, 1905

Township 1 South, Range 1 East of the W.R.M.

Parcel and Land Description	Acreage	Award
Section 21: SW¼SW¼	38.85	116.55
Section 27: N½NW¼	64.25	192.75
Section 28: N½SE¼	77.75	233.25
Section 28: SW¼SE¼, SE¼SW¼	69.99	209.97
Section 29: SE¼SW¼	31.70	95.13
Section 32: NW¼NE¼	35.61	106.83
TOTALS	318.15	954.48

CLAIM NO. 3

CLAIMANT, CHARLES M. ROEMER

Box 563, Lander, Wyoming 82520

Acres claimed: 53
Acres awarded: 25
Acre-feet Per Year Awarded: 75
Priority Date: March 18, 1905

Township 1 South, Range 1 West of the W.R.M.

Section 5: S½NW¼SE¼, NW¼NW¼SE¼, SW¼SE¼

CLAIM NO. 4

CLAIMANT, HOMER BLOMBERG, SR.
P.O. Box 229, Riverton, Wyoming 82501

Acres claimed: 15.47
Acres awarded: 15.00
Acre-feet Per Year Awarded: 45
Priority Date: March 18, 1905

Township 1 South, Range 4 East of the W.R.M.
Section 10: E½NW¼NW¼

CLAIM NO. 5

CLAIMANT, KENNETH AND GLADYS HANSEN
Box 55 Star Route, Arapahoe, Wyoming 82510

Total acres claimed: 152
Acres awarded: 152
Acre-feet Per Year Awarded: 456
Priority Date: March 18, 1905

C-1: *Township 1 South, Range 1 East of the W.R.M.*
Section 1: E½SE¼
Acres claimed: 42

C-2: *Township 1 South, Range 1 East of the W.R.M.*
Section 11: W½NW¼
Acres claimed: 71

C-3: *Township 1 South, Range 1 East of the W.R.M.*
Section 12: NW¼NE¼
Acres claimed: 39

CLAIM NO. 6

CLAIMANT, JAMES NIRIDER

Box 62, Arapahoe, Wyoming 82501

Total Acres claimed: 248.46

Acres awarded: 248.46

Acre-feet Per Year Awarded: 745.38

Priority Date: March 18, 1905

F-1: *Township 1 South, Range 1 East of the W.R.M.*

Section 2: E½SE¼, and SE½NE¼

Acres claimed: 72.0

F-2: *Township 1 South, Range 2 East of the W.R.M.*

Section 7: SE¼NW¼, and Lot 2

Acres claimed: 79.16

F-3: *Township 1 South, Range 1 East of the W.R.M.*

Section 35: E½SE¼

Acres claimed: 97.3

CLAIM NO. 7

CLAIMANT, THOMAS REED

P.O. Box 45, Lander, Wyoming 82520

Total Acres claimed: 115 (170 less 55, G-1)

Acres awarded: 115

Acre-feet Per Year Awarded: 345

Priority Date: March 18, 1905

G-1: *Township 1 South Range 1 East of the W.R.M.*

Section 15: S½NW¼

Acres claimed: 55

G-2: *Township 1 South, Range 1 East of the W.R.M.*

Section 22: S½NE¼

Acres claimed: 60

G-3: *Township 1 South, Range 1 East of the W.R.M.*

Section 22: N½NW¼

Acres claimed: 55

CLAIM NO. 8

CLAIMANT, DONALD BATH;
DHB & CO., and PLB & CO.

Star Route, Box 95, Arapahoe, Wyoming 82510

Total Acres claimed: 492.95

Acres awarded: 459.70

Acre-feet Per Year Awarded: 1380

Priority Date: May 5, 1905

B-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 13: E½NE¼

Acres claimed: 78.1

B-2: *Township 1 South, Range 3 East of the W.R.M.*

Section 14: E½NW¼

Acres claimed: 78.85

B-3: *Township 1 South, Range 3 East of the W.R.M.*
Section 14: SW¼NE¼ and NW¼SE¼
Acres claimed: 74.2

B-4: *Township 1 South, Range 3 East of the W.R.M.*
Section 14: SE¼NE¼ and NE¼SE¼
Acres claimed: 69.3

B-5: *Township 1 South, Range 3 East of the W.R.M.*
Section 15: N½NE¼
Acres claimed: 74.25

B-6: *Township 1 South, Range 3 East of the W.R.M.*
Section 16: SE¼SE¼ (33.25 acres)
Section 21: E½NE¼ (25.00 acres)
Acres claimed: 58.25

B-7: *Township 1 South, Range 3 East of the W.R.M.*
Section 22: NW¼
Acres claimed: 60

CLAIM NO. 9

CLAIMANT, BRADFORD BATH

Star Route, Box 95, Arapahoe, Wyoming 82510

Total Acres claimed: 79.0
Acres awarded: 79.0
Acre-feet Per Year Awarded: 237
Priority Date: May 5, 1905

A-1: *Township 1 South, Range 3 East of the W.R.M.*
Section 14: W½SW¼ (except 2.76 acres)
Acres claimed: 79.0

CLAIM NO. 10

CLAIMANT, ARTHUR AND WANDA LUCAS

Box 22, Star Route, Arapahoe, Wyoming 82510

Total Acres claimed: 31

Acres awarded: 31

Acre-feet Per Year Awarded: 93

Priority Date: May 5, 1905

O-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 17: SW¼SE¼

Acres claimed: 19

O-2: *Township 1 South, Range 3 East of the W.R.M.*

Section 20: Westerly 990′ of E½NE¼

Acres claimed: 12

CLAIM NO. 11

CLAIMANT, HENRY AND VIOLET LEWIS

Arapahoe Route, Box 3060, Riverton, Wyoming 82510

Total Acres claimed: 62

Acres awarded: 62

Acre-feet Per Year Awarded: 186

Priority Date: May 5, 1905

N-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 12: E½SE¼

CLAIM NO. 12

CLAIMANT, GRIFFIN BROTHERS, INCORPORATED
by HERSCHEL GRIFFIN

Box 322, Riverton, Wyoming 82501

Total Acres claimed: 456

Acres awarded: 100

Acre-feet Per Year Awarded: 300

Priority Date: March 18, 1905

P-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 1: S½ of Lot 1, SE¼NE¼, N½NE¼SE¼

Acres claimed: 5

P-2: *Township 1 South, Range 3 East of the W.R.M.*

Section 1: SW¼NE¼, N½NW¼, SE¼, S½ of Lot 2 (NW¼NE¼)

Acres claimed: 10

P-3: *Township 1 South, Range 4 East of the W.R.M.*

Section 7: Lot 1 (NW¼NW¼), NE¼NW¼, NW¼NE¼

Acres claimed: 85

P-4: *Township 1 South, Range 4 East of the W.R.M.*

Section 16: Lot 3 (SW¼NW¼, W½SW¼)
Section 17: Lot 2, Lot 3, E¼SE¼

Acres claimed: 170

P-5: *Township 1 South, Range 4 East of the W.R.M.*

Section 17: NE¼SE¼, NW¼SE¼

Acres claimed: 61

P-6: *Township 1 South, Range 4 East of the W.R.M.*

Section 17: SW¼SE¼
Section 20: NW¼NE¼

Acres claimed: 30

P-7: *Township 1 South, Range 4 East of the W.R.M.*

Section 19: SE¼NW¼, SW¼NE¼,
NW¼SE¼, NE¼SE¼

Acres claimed: 95

CLAIM NO. 13

CLAIMANT, DON VAN RIPER

Route 61, Box 63, Lander, Wyoming 82601

Total Acres claimed: 54

Acres awarded: 54

Acre-feet Per Year Awarded: 162

Priority Date: March 18, 1905

K-1: *Township 1 South, Range 2 East of the W.R.M.*

Section 6: Lot 4 (NW¼NW¼)
Lot 5 (SW¼NW¼)

CLAIM NO. 14

CLAIMANT, RALPH AND EILEEN URBIGKIT

Crowheart, Wyoming 82512

Total Acres claimed: 325.7

Acres awarded: 325.7

Acre-feet Per Year Awarded: 977

Priority Date: April 27, 1905

I-1: *Township 4 North, Range 4 West of the W.R.M.*

Section 2: E½SW¼

I-2: *Township 4 North, Range 4 West of the W.R.M.*

Section 2: SW¼SW¼

Acres claimed, both I-1 and I-2: 96.3

I-3: *Township 4 North, Range 4 West of the W.R.M.*

Section 2: SE¼NW¼

I-4: *Township 4 North, Range 4 West of the W.R.M.*

Section 16: S½NE¼, SE¼NW¼

Acres claimed, both I-3 and I-4: 31.4

I-5: *Township 4 North, Range 4 West of the W.R.M.*

Section 16: S½NE¼, SE¼NW¼

Acres claimed: 94

I-6: *Township 4 North, Range 4 West of the W.R.M.*

Section 16: N½SE¼, NE¼SW¼

Acres claimed: 104

CLAIM NO. 15

CLAIMANT, DALE AND PATRICIA URBIGKIT

Wyoming

Total Acres claimed: 265

Acres awarded: 195

Acre-feet Per Year Awarded: 585

Priority Date: April 27, 1905

H-1: *Township 4 North, Range 4 West of the W.R.M.*

Section 4: SW¼NE¼, NW¼SE¼, Lot 6

Acres claimed: 65

H-2: *Township 4 North, Range 4 West of the W.R.M.*

Section 4: W½, S½NW¼, S½ of Lot 3, S½ of Lot 4

Acres claimed: 200

CLAIM NO. 16

CLAIMANT, RALPH FLOYD URBIGKIT

Crowheart, Wyoming 82512

Total Acres claimed: 259.60

Acres awarded: 153.85

Acre-feet Per Yard Awarded: 461.55

Priority Date: April 27, 1905

J-1: *Township 4 North, Range 4 West of the W.R.M.*

Section 11: SE¼, SE¼NE½

Acres claimed: 153.85

J-2: *Township 4 North, Range 4 West of the W.R.M.*
Section 15: NW¼NE¼, NW½NW¼
Acres claimed: 105.75

CLAIM NO. 17

CLAIMANT, JOHN (JR.) and
BARBARA LONGFELLOW

Box 46, Star Route Arapahoe, Wyoming 82510

Total Acres claimed: 225
Acres awarded: 225
Acre-feet Per Year Awarded: 675
Priority Date: March 18, 1905

Township 1 South, Range 2 East of the W.R.M.

Section 8: NE¼NE¼
Section 9: W½NW¼, NE¼NE¼
Section 16: SW¼SW¼
Section 17: SE¼SE¼
Acres claimed: 240 (225 net)

CLAIM NO. 18

CLAIMANT, VERL SNEED and
HOMER BLOMBERG, JR.
by ANNA MERLE BLOMBERG

P.O. Box 229, Riverton, Wyoming 82510

Total Acres claimed: 35
Acres awarded: 35
Acre-feet Per Year Awarded: 105
Priority Date: March 18, 1905

Township 1 South, Range 4 East of the W.R.M.

Section 9: NE¼NE¼

CLAIM NO. 19

CLAIMANT, KATHRYN LINDEN DICKINSON
Route 2, Box 555, Riverton, Wyoming 82510

Total Acres claimed: 16
Acres awarded: 16
Acre-feet Per Year Awarded: 48
Priority Date: May 5, 1905

Township 1 South, Range 3 East of the W.R.M.
Section 17: SE¼SE¼

CLAIM NO. 20

CLAIMANT, KENNETH AND PATRICIA PERSSON
680 Bonnie Brae, Lander, Wyoming 82510

Total Acres claimed: 100
Acres awarded: 70
Acre-feet Per Year Awarded: 210
Priority Date: March 18, 1905

Township 1 South, Range 1 West of the W.R.M.
Section 25: W½SE¼, E½SW¼

CLAIM NO. 21

CLAIMANT, CHARLES RICHARDSON
Arizona

Total Acres claimed: 60
Acres awarded: 60
Acre-feet Per Year Awarded: 180
Priority Date: April 27, 1905

R-1: *Township 4 North, Range 3 West, of the W.R.M.*

Section 28: $SE\frac{1}{4}SW\frac{1}{4}$, Lot 6 ($NW\frac{1}{4}SW\frac{1}{4}$), Lot 11 ($SE\frac{1}{4}NW\frac{1}{4}$)

Section 33: $N\frac{1}{2}NE\frac{1}{4}NW\frac{1}{4}$

CLAIM NO. 22

CLAIMANT, DR. AND MRS. RICHARD D. MARTIN

Box 637, Crowheart, Wyoming 82512

Total Acres claimed: 80

Acres awarded: 53.6

Acre-feet Per Year Awarded: 161

Priority Date: April 27, 1905

E-1: *Township 4 North, Range 5 West of the W.R.M.*

Section 36: $W\frac{1}{2}NW\frac{1}{4}$ and $NW\frac{1}{4}SW\frac{1}{4}$

CLAIM NO. 23

CLAIMANT, ROBERT PERALTA

Red Creek Ranch, Crowheart, Wyoming 82512

Total Acres claimed: 456

Acres awarded: 306

Acre-feet Per Year Awarded: 918

Priority Date: April 27, 1905

Township 5 North, Range 5 West of the W.R.M.

Section 7: $SE\frac{1}{4}SE\frac{1}{4}$, Lot 6 ($SE\frac{1}{4}NE\frac{1}{4}$, $NE\frac{1}{4}SE\frac{1}{4}$), Lot 10 ($NW\frac{1}{4}SW\frac{1}{4}$), Lot 11 ($SW\frac{1}{4}SW\frac{1}{4}$), $SW\frac{1}{4}SE\frac{1}{4}$, Lot 8 ($NE\frac{1}{4}SW\frac{1}{4}$), $SE\frac{1}{4}SW\frac{1}{4}$

Section 8: Lot 6 ($SW\frac{1}{4}NW\frac{1}{4}$), $NW\frac{1}{4}SW\frac{1}{4}$, $SW\frac{1}{4}SW\frac{1}{4}$

Section 18: Lot 1 ($NW\frac{1}{4}NW\frac{1}{4}$), Lot 2 ($SW\frac{1}{4}NW\frac{1}{4}$), $NE\frac{1}{4}NW\frac{1}{4}$, $NW\frac{1}{4}NE\frac{1}{4}$

CLAIM NO. 24

CLAIMANT, LANDIS WEBBER
FOR RED CREEK CATTLE COMPANY

Wyoming 82512

Total Acres claimed: 274

Acres awarded: None

Acre-feet Per Year Awarded: None

Township 8 North, Range 2 East of the W.R.M.

Section 5: Lot 2 ($NW\frac{1}{4}NE\frac{1}{4}$)
Lot 3, $SE\frac{1}{4}NW\frac{1}{4}$

CLAIM NO. 25

CLAIMANT, BERTHA LEE JONES

Wyoming

Total Acres claimed: 240

Acres awarded: None

Township 9 North, Range 2 East of the W.R.M.

Section 35: $SE\frac{1}{4}NW\frac{1}{4}$, Lot 1 ($NE\frac{1}{4}NW\frac{1}{4}$), $W\frac{1}{2}SE\frac{1}{4}$, $W\frac{1}{2}NE\frac{1}{4}$

CLAIM NO. 26

CLAIMANT, GRACE GRABOSKI

Wyoming

Total Acres claimed: 200

Acres awarded: None

Township 9 North, Range 2 East of the W.R.M.

Section 35: Lot 3 ($SE\frac{1}{4}NW\frac{1}{4}$), $W\frac{1}{2}SW\frac{1}{4}$, $E\frac{1}{2}SW\frac{1}{4}$

DONE this —— day of June, 1984.

BY THE COURT:

_____

District Judge

PART II

DISPOSITION OF UNADJUDICATED CERTIFICATES

(OTHERWISE REFERRED TO AS EXPIRED PERMITS)

In recognition of their status under Wyoming law, I have dealt with these matters in the following way:

1. On October 21, 1981, I conducted an informal conference in Cheyenne with counsel for the Tribes, the United States and the State of Wyoming, concerning these unadjudicated permits, expired or otherwise. The State Engineer was present and suggested a procedure whereby his office would begin an administrative review of the status of each permit and, after appropriate notice to the owner(s) thereof, begin proceedings to sort the permits by their legal status and the type of action required to deal with each. The purpose of this was to remove clutter from the office of the State Engineer, an observation made by many counsel in these proceedings. Counsel for the United States and the Tribes agreed to the procedure, and I requested the State Engineer to begin his office examination.

2. Sometime in 1982, the State Engineer began his analysis, consisting of the following:

(a) Identification of the name and address of the current owner(s) of lands served by each permit with reference to tax records, BIA land title indices and similar documents;

(b) Mailing of a letter and response form to each owner(s) by certified mail (sample copies of the letter and form sent to each owner are attached hereto as Exhibit B); and

(c) Tabulation of the permits based on the response (or lack thereof) received from each owner and further based upon an examination of the State Engineer's records concerning each permit.

3. Each of the approximately 3,000 uncancelled permits in Water Division 3 were to be categorized by the State Engineer as one of the following:

(a) *"Doubtful" Permits*: Those permits which either:

(1) appear to be in good standing as all notices required to be filed with the State Engineer have been filed; or

(2) those in doubtful standing in the State Engineer's records in that one or more of the required filings appear to be incomplete, inadequate or have not been made, but the owner(s) of land served by said permits have indicated an intent to prove historic irrigation pursuant to the terms of the permit;

(b) *"Expired Permits"*: Those permits which do not appear to be in good standing in the records of the State Engineer and for which the owner(s) of lands served thereby have not responded to the State Engineer's letter or have indicated that no irrigation has occurred in accordance with the terms of the permit; and

(c) *"Unripe Permits"*: Those permits for which the time for filing all notices has not yet run or for which the time for filing said notices has been extended.

4. On February 8, 1983, I held an informal pretrial conference with counsel for the Tribes, the United States, the State of Wyoming and many private parties. At the conference, the State reported that the State Engineer had thus far sent approximately 840 letters and that it would require at least one year to complete the identifica-

tion of current owners, the sending of letters, and the tabulation of the responses into one of the categories described above. As of the date of the filing of this Supplemental and Final Report (June 1, 1984), there has been no request for hearings to cancel expired permits that are now "ripe" for cancellation.

With respect to the above unadjudicated permits, I respectfully recommend that:

1. The Court enter its order directing the State Engineer to continue his work and to report the results thereof directly to the Court; and

2. Upon receipt of the State Engineer's report:

(a) A Special Master should be appointed in the future, pursuant to Rule 53, W.R.C.P., to conduct hearings concerning the "doubtful" permits; or in lieu thereof, the Court should direct the State Board of Control to serve as a Special Master for this purpose; and at the conclusion of these hearings, the Special Master or the State Board of Control should recommend that each permit should either be adjudicated into a certificate of appropriation, or be cancelled;

(b) After publication of a listing of the "expired" permits and the passage of a reasonable time in which to object, if no objections are heard, the Court should enter an order cancelling the "expired" permits; and

(c) Proceedings concerning the "unripe" permits should be deferred until such time as actions may be appropriate.

PART III

THE CONFIRMING OF ADJUDICATED CERTIFICATES

1. Shortly after the Court's 1979 referral to me as Special Master, I began to conduct proceedings concerning the state-awarded water rights which are the subject of this and its predecessor Report.

2. At the September 24, 1979 Pretrial Conference held in Cheyenne, I ruled that certificates of appropriation issued by the Wyoming Board of Control constituted a prima facie evidence of a water right and, further, the contents of said certificates were presumed to be true and correct until rebutted by other evidence. During the fall of 1979, Wyoming introduced, and I received into evidence, certified copies of all adjudicated certificates of appropriation in Water Division 3 as well as what is known as the Baldwin Creek Decree.

3. While the United States and the Tribes originally sought to challenge the validity of many of these certificates, they ultimately reached a stipulation with the State and counsel for many of the private parties. That stipulation, adopted and approved by me, provided for the provisional conformation of all adjudicated rights subject to the terms of that stipulation. It provided as follows:

> 1. Neither the United States nor the Tribes will raise objections to provisional confirmation of adjudicated rights until after the reserved rights and any of the water rights under Federal law of the United States and the Tribes has been determined by the Master and District Court. No challenge to the United States' or the Tribes' adjudicated rights under Wyoming law shall be made by any party until after the determination of the rights as stated above.

2. After determintaion of the Tribes' and United States' rights, the Tribes, United States, Wyoming, and any other party shall have a reasonable period of time in which to contest before the Master any provisionally confirmed adjudicated right. The Tribes and the United States may contest only rights which have a higher priority than their reserved rights or other rights held under Federal or State law, and which may have an adverse impact on the exercise of such rights. No such challenge by the Tribes or United States shall result in any change in quantity of water or priority dates for rights of the Tribes, and the United States as determined by the Master and the Court, such matters being left to appeal procedures.

3. The procedures for making such a challenge shall be as follows:

(a) The party asserting the challenge shall have a reasonable time to serve notice in accordance with Wyoming Statute 41-3-401(c), and additionally, upon all counsel of record. The notice shall include:

(1) the permit number and the certificate of appropriation number of each right challenged;

(2) the name and address of the last known holder of each challenged right;

(3) a brief statement of the specific factual basis for each challenge;

(4) the identity of the right of the challenging party which is junior to and which upon which the challenged right has an adverse impact.

(b) As soon as is convenient after notice is served, each challenge shall be set for hearing

by notice specifying the rights to be heard on each date. The hearings on the challenges shall be set sufficiently in advance so as to preserve to each party the right to discovery pursuant to the Wyoming Rules of Civil Procedure.

(c) The party asserting the challenge shall have the burden of proving facts sufficient to show abandonment, forfeiture or reduction of the challenged right pursuant to Wyoming law.

(d) Any hearing conducted pursuant to the Stipulation shall be governed by Wyoming Rules of Civil Procedure.

In conclusion, with respect to the adjudicated rights, I respectfully recommend that said rights be provisionally confirmed, subject to the terms of the aforementioned stipultaion. This motion for confirmation was urged upon me vigorously by several special counsel for the State of Wyoming and it is recommended herein even though I have failed to find, through many hours of research, how an adjudicated water right within the State of Wyoming can be made any stronger by having been confirmed by an act of a District Court. But this matter is not before me nor the Court for philosophic observation.

June 1, 1984

The Honorable Alan Johnson, Judge
District Court, First Judicial District
19th and Carey Avenue
Cheyenne, Wyoming 82001

Sir:

This Supplemental and Final Report, together with Findings, Conclusions and Recommended Decree, are,

Respectfully submitted,

Teno Roncalio
Special Master

TR:vlh
Enclosures